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SUPREME COURT, U. S.

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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 695

CHARLES C. GREEN, *et al.*,

Petitioners,

—v.—

COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 9, 1967
CERTIORARI GRANTED DECEMBER 11, 1967

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District Court Docket Sheet

4266—New Kent

DATE	PROCEEDINGS
1965	
March 15	Complaint filed, summons issued. • • •
Apr. 5	Motion to dismiss filed by County School Board of New Kent Co., W. R. Davis, E. P. Binns, Jr., W. J. Wallace, Jr. and Harry S. Mountcastle, ind. & as members of the County School Board and Byrd W. Long, Div. Supt. of Schools of New Kent Co., Va.
May 3	Motion for consolidation of motion to dismiss with hearing on merits, for requirement of answer by defts and for fixing of trial date filed by pltf.
" 5	Order deferring ruling on motion to dismiss; directing defts. to answer on or before 6-1-65; directing Clerk to call case at next docket call, ent. 5-5-65. • • •
" 7	Interrogatories filed by plfs.
" 24	Order extending time to 6-8-65 for deft. School Board to file answers to interrogatories ent. 5-24-65. • • •
June 1	Answer filed by defts.
" 8	Answer to interrogatories filed by County School Board of New Kent Co., Va. Exhibits attached • • •
1966	
May 4	TRIAL PROCEEDINGS—Butzner, J.: Parties appeared by counsel. Issues joined. Discussion. Court to enter order.

DATE

PROCEEDINGS

- May 4 * * * Motion of defendants for 30 days within which to file Plan, granted.
- " 10 Plan of desegregation filed by School Board.
- " 17 Memorandum of the court filed
- " " Order that defts/ motion to dismiss denied; Pltfs. prayer for an injunction restraining school construction & purchase of school sites denied; Defts. granted leave to submit on or before June 6, 1966 amendments to their plan which will provide for employment & assignment on non-racial basis. Pending receipt of these amendments to their plan which will defer approval of plan & consideration of other ~~injunctive~~ relief; Pltfs. motion for counsel fees denied; Case will be retained upon docket with leave granted to any party to petition for further relief; Pltfs. shall recover their costs to date.; ent. & filed; * * *
- June 6 Motion for leave to file & request for approval of a plan supplement filed by defts. together with plan supplement.
- " 10 Exceptions to plan supplement filed by pltf.
- June 10 IN OPEN COURT—Butzner, J.: Counsel discussed exceptions to Plan. Court will approve Plan.
- " 16 Notice of Appeal from order of 5-17-66 filed by plfs.
* * *
- " 28 Memorandum of the Court filed.
- " " Order approving Plan adopted by the New Kent County School Board, ent. 6-28-66. Case to be retained on docket. * * *

Complaint

(Filed March 15, 1965)

I

1. (a) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, and under Title 42, United States Code, Section 1981, as hereafter more fully appears. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars (\$10,000.00).

(b) Jurisdiction is further invoked under Title 28, United States Code, Section 1343(3). This action is authorized by Title 42, United States Code, Section 1983 to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States and by Title 42, United States Code, Section 1981, providing for the equal rights of citizens and of all persons within the jurisdiction of the United States, as hereafter more fully appears.

II

2. Infant plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the political subdivision of Virginia for which the defendant school board maintains and operates public schools. Said infants are within the

age limits or will be within the age limits to attend, and possess or upon reaching such age limit will possess all qualifications and satisfy all requirements for admission to, said public schools.

3. Adult plaintiffs are Negroes, are citizens of the United States and are residents and taxpayers of and domiciled in the Commonwealth of Virginia and the above mentioned political subdivision thereof. Each adult plaintiff who is named in the caption as next friend of one or more of the infant plaintiffs is a parent, guardian or person standing in *loco parentis* of the infant or infants indicated.

4. The infant plaintiffs and their parents, guardians and persons standing in *loco parentis* bring this action in their own behalf and, there being common questions of law and fact affecting the rights of all other Negro children attending public schools in the Commonwealth of Virginia and, particularly, in the said political subdivision, similarly situated and affected with reference to the matters here involved, who are so numerous as to make it impracticable to bring all before the Court, and a common relief being sought as will hereinafter more fully appear, the infant plaintiffs and their parents, guardians and persons standing in *loco parentis* also bring this action, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, as a class action on behalf of all other Negro children attending or who hereafter will attend public schools in the Commonwealth of Virginia and, particularly, in said political subdivision and the parents and guardians of such children similarly situated and affected with reference to the matters here involved.

5. Further, the adult plaintiffs bring this action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure as a class action on behalf of those of the citizens and taxpayers of said political subdivision who are Negroes; the tax raised contribution of persons of that class toward the establishment, operation and maintenance of the schools controlled by the defendant school board being in excess of \$10,000.00. The interests of said class are adequately represented by the plaintiffs.

III

6. The Commonwealth of Virginia has declared public education a state function. The Constitution of Virginia, Article IX, Section 129, provides:

"Free schools to be maintained. The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

Pursuant to this mandate, the General Assembly of Virginia has established a system of public free schools in the Commonwealth of Virginia according to a plan set out in Title 22, Chapters 1 to 15, inclusive, of the Code of Virginia, 1950. The establishment, maintenance and administration of the public school system of Virginia is vested in a State Board of Education, a Superintendent of Public Instruction, Division Superintendents of Schools, and County, City and Town School Boards (Constitution of Virginia, Article IX, Sections 130-133; Code of Virginia, 1950, Title 22, Chapter 1, Section 22-2).

IV

7. The defendant School Board exists pursuant to the Constitution and laws of the Commonwealth of Virginia as

an administrative department of the Commonwealth, discharging governmental functions, and is declared by law to be a body corporate. Said School Board is empowered and required to establish, maintain, control and supervise an efficient system of public free schools in said political subdivision, to provide suitable and proper school buildings, furniture and equipment, and to maintain, manage and control the same, to determine the studies to be pursued and the methods of teaching, to make local regulations for the conduct of the schools and for the proper discipline of students, to employ teachers, to provide for the transportation of pupils, to enforce the school laws, and to perform numerous other duties, activities and functions essential to the establishment, maintenance and operation of the public free schools in said political subdivision. (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, as amended, Title 22.) The names of the individual members of the defendant School Board are as stated in the caption and they are made defendants herein in their individual capacities.

8. The defendant Division Superintendent of Schools, whose name as such is stated in the caption, holds office pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative officer of the public free school system of Virginia. (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, as amended, Title 22.) He is under the authority, supervision and control of, and acts pursuant to the orders, policies, practices, customs and usages of the defendant School Board. He is made a defendant herein as an individual and in his official capacity.

9. A Virginia statute, known as the Pupil Placement Act, first enacted as Chapter 70 of the Acts of the 1956 Extra Session of the General Assembly, viz. Article 1.1 of Chapter 12 of Title 22 (Sections 22-232.1 through 22-232.17) of the Code of Virginia, 1950, as amended, confers or purports to confer upon the Pupil Placement Board all power of enrollment or placement of pupils in the public schools in Virginia and to charge said Pupil Placement Board to perform numerous duties, activities and functions pertaining to the enrollment or placement of pupils in, and the determination of school attendance districts for, such public schools, except in those counties, cities or towns which elect to be bound by the provisions of Article 1.2 of Chapter 12 of Title 22 (Sections 22-232.18 through 22-232.31) of the Code of Virginia, 1950, as amended.

10. Plaintiffs are informed and believe that in executing its power or purported power of enrollment or placement of pupils in and determination of school districts for the public schools of said political subdivision, the Pupil Placement Board will follow and approve the recommendations of the defendant School Board unless it appears that such recommendation would deny the application of a Negro parent for the assignment of his child to a school attended by similarly situated white children.

11. The procedures provided by the Pupil Placement Act do not provide an adequate means by which the plaintiffs may obtain the relief here sought.

V

12. Notwithstanding the holding and admonitions in *Brown v. Board of Education*, 347 U. S. 483 (1954) and

349 U. S. 294 (1955), the defendant School Board maintains and operates a biracial school system in which certain schools are designated for Negro students only and are staffed by Negro personnel and none other, and certain schools are designated for white students or primarily for white students and are staffed by white personnel and none other. This pattern continues unaffected except in the few instances, if any there are, in which individual Negroes have sought and obtained admission to one or more of the schools designated for white students. The defendants have not devoted efforts toward initiating nonsegregation in the public school system, neither have they made a reasonable start to effectuate a transition to a racially nondiscriminatory school system, as under paramount law it is their duty to do. Deliberately and purposefully, and solely because of race, the defendants continue to require or permit all or virtually all Negro public school children to attend schools where none but Negroes are enrolled and none but Negroes are employed as principal or teacher or administrative assistant and to require all white public school children to attend school where no Negroes, or at best few Negroes, are enrolled and where no Negroes teach or serve as principal or administrative assistant.

13. Heretofore, petitions signed by several persons similarly situated and conditioned as are the plaintiffs with respect to race, citizenship, residence and status as taxpayers, were filed with the defendant School Board, asking the School Board to end racial segregation in the public school system and urging the Board to make announcement of its purpose to do so at its next regular meeting and promptly thereafter to adopt and publish a plan by which racial discrimination will be terminated with respect to

administrative personnel, teachers, clerical, custodial and other employees, transportation and other facilities, and the assignment of pupils to schools and classrooms.

14. Representatives of the plaintiff class forwarded said petitions to the defendant School Board with a letter, copy of which was sent to each member of the defendant School Board, part of which is next set forth:

" * * *. In the light of the following and other court decisions, your duty [to promptly end racial segregation in the public school system] is no longer open to question:

Brown v. Bd. of Education, 347 U. S. 483 (1954);

Brown v. Bd. of Education, 349 U. S. 294 (1955);

Cooper v. Aaron, 358 U. S. 1 (1958);

Bradley v. School Bd. of the City of Richmond,
317 F 2d 429 (4th Cir. 1963);

Bell v. Co. School Ed. of Powhatan Co., 321 F
2d 494 (4th Cir. 1963).

"We call to your attention the fact that in the last cited case the unyielding refusal of the County School Board of Powhatan County, Virginia, to take any initiative with regard to its duty to desegregate schools resulted in the board's being required to pay costs of litigation including compensation to the attorneys for the Negro school children and their parents. We are advised that upon a showing of a deliberate refusal of individual school board members to perform their clear duty to desegregate schools, the courts may require them as individuals to bear the expense of the litigation.

"In the case of *Watson v. City of Memphis*, 373 U. S. 526 (1963) the Supreme Court of the United States expressed its unanimous dissatisfaction with the slothfulness which has followed its 1955 mandate in *Brown v. Board of Education*, saying: 'The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.'"

15. More than two regular meetings of the defendant School Board have been held since it received the petitions and letter above referred to. Neither by word or deed has the defendant School Board indicated its willingness to end racial segregation in its public school system.

VI

16. In the following and other particulars, plaintiffs suffer and will continue to suffer irreparable injury as a result of the persistent failure and refusal of the defendants to initiate desegregation and to adopt and implement a plan providing for the elimination of racial discrimination in the public school system.

17. Negro public school children are yet being educated in inherently unequal separate educational facilities specially sited, built, equipped and staffed as Negro schools, in violation of their liberty and of their right to equal protection of the laws.

18. Negro adult citizens are yet being taxed for the support and maintenance of a biracial school system the very existence of which connotes a degrading classification of the citizenship status of persons of the Negro race, in violation of the Fourteenth Amendment to the Constitution.

19. Public funds are being spent and will be spent by the defendants for the erection of schools and additions to schools deliberately planned and sited so as to insure or facilitate the continued separation of Negro children in the public school system from others of similar age and qualification solely because of their race, contrary to the provisions of the Fourteenth Amendment which forbid governmental agencies, whether acting ingeniously or ingenuously, to make any distinctions between citizens based on race.

20. This action has been necessitated by reason of the failure and refusal of the individual members of the defendant School Board to execute and perform their official duty, which since May 31, 1955 has been clear, to initiate desegregation and to make and execute plans to bring about the elimination of racial discrimination in the public school system.

VII

WHEREFORE, plaintiffs respectfully pray:

A. That the defendants be restrained and enjoined from failing and refusing to adopt and forthwith implement a plan which will provide for the prompt and efficient elimination of racial segregation in the public schools operated by the defendant School Board, including the elimination of any and all forms of racial discrimination with respect to administrative personnel, teachers, clerical, custodial and other employees, transportation and other facilities, and the assignment of pupils to schools and classrooms.

B. That pending the Court's approval of such plan the defendants be enjoined and restrained from initiating or

proceeding further with the construction of any school building or of any addition to an existing school building or the purchase of land for either purpose to any extent not previously approved by the Court.

C. That the defendants pay the costs of this action including fees for the plaintiffs' attorneys in such amounts as to the Court may appear reasonable and proper and that the plaintiffs have such other and further relief as may be just.

/s/ S. W. TUCKER
Of Counsel for Plaintiffs

Motion to Dismiss**(Filed April 5, 1965)**

Now come the County School Board of New Kent County, Virginia, W. R. Davis, E. P. Binns, Jr., W. J. Wallace, Jr., and Harry S. Mountcastle, individually and as members of the County School Board, and comes Byrd W. Long, Division Superintendent of Schools of New Kent County, Virginia, and move the Court to dismiss the Complaint herein upon the following grounds:

1. The Complaint fails to state a claim upon which relief can be granted.

(Signature of Counsel Omitted)

Order on Motion to Dismiss

The Court defers ruling on the motion to dismiss. The defendants are directed to answer on or before June 1, 1965.

The Clerk is directed to call this case at the next docket call.

Let the Clerk send copies of this order to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

May 5, 1965

Plaintiffs' Interrogatories

(Filed May 7, 1965)

Plaintiffs request that the defendant School Board, by an officer or agent thereof, answer under oath in accordance with Rule 33, Federal Rules of Civil Procedure, the following interrogatories:

1. List for each public school operated by the defendant School Board the following:

- a. Date on which each school was erected;
- b. Grades served by each school during the 1964-65 school term;
- c. Planned pupil capacity of each school;
- d. Number of white pupils in attendance at school in each grade level as of most recent dates for which figures are available for 1964-65 term;
- e. Number of Negro pupils in attendance at school in each grade level as of most recent date for which figures are available for 1964-65 term;
- f. Number of Negro teachers and other administrative or professional personnel and the number of white teachers, etc., employed at each school during 1964-65 school term;
- g. Pupil-teacher ratio at each school during 1964-65 school term (most recent available figures);
- h. Average class size for each school during 1964-65 school term (most recent available figures);
- i. Name and address of principal of each school.

2. Furnish a map or maps indicating the attendance areas served by each school in the system during the 1963-64 term and the 1964-65 term. If no such map or maps can be furnished, state where such maps or other descriptions of the attendance areas may be found and inspected.

3. State the number of Negro pupils and the number of white pupils, by grade level, residing in each attendance area established by the School Board during the 1964-65 school term. If definite figures are unavailable, give the best projections or estimates available, stating the basis for any such estimates or projections.

4. State whether any pupils are transported by school buses to schools within the school division, and if there are any, give the average daily attendance of transported students during 1964-65 term, stating separately the number of white pupils and the number of Negro pupils in the elementary grades and in the high schools and in the junior high schools.

5. Furnish a map or maps indicating the bus routes in effect throughout the school division during the 1963-64 term and for the 1964-65 term (indicate for each bus route the name and address of the bus driver and the race of the students transported).

6. State with respect to the 1964-65 term, the total number of white pupils who reside in the attendance area of an all-Negro school, but were in attendance at an all-white or predominantly white school. Indicate with respect to such pupils the following:

a. Number, by grade, residing in the attendance area of each Negro school;

b. The schools actually attended by white pupils residing in the attendance area of each Negro school.

7. State the total number of Negro pupils who were initially assigned to attend all-white or predominantly white schools for the first time during either the 1963-64 school term or the 1964-65 term. Give a breakdown of these totals by schools and grades.

8. State whether during the 1964-65 term it was necessary at any schools to utilize for classroom purposes any areas not primarily intended for such use, such as library areas, teachers' lounges, cafeterias, gymnasiums, etc. If so, list the schools and facilities so utilized.

9. State whether a program or course in Distributive Education is offered in the school system and if so at what schools it is offered.

10. Are any special teachers for subjects such as art and music provided?

11. If so, state:

a. The number of such special teachers in the system;

b. The number of full-time special teachers;

c. The number of part-time special teachers;

d. The schools to which they are assigned for the current school year;

e. The schools to which they were assigned for the preceding school year.

12. Indicate whether a program of vocational education was offered in any school or schools in the system during the 1963-64 or the 1964-65 school term.

13. If so, state for each such year the name of each vocational education course at each school and the number of pupils enrolled therein; and give the number of individuals teaching vocational education at each school.

14. Furnish a statement of the curriculum offered at each junior high school and each high school in the system during the 1964-65 term.

15. Furnish a list of the courses of instruction, if any, which are available to seventh grade students who attend junior high schools in the system but are not available to those seventh grade pupils assigned to elementary schools.

16. State whether any summer school programs operated by the School Board have been operated on a desegregated basis with Negro and white pupils attending the same classes.

17. Are any buildings of frame construction presently being utilized for schools? If so, which ones?

18. Are any of the school buildings in need of major repairs? If so, which ones?

19. State with respect to any new school construction which is now contemplated, the following with respect to each such project:

a. Location of contemplated school or addition;

b. Size of school, present and proposed number of classrooms, grades to be served, and projected capacity;

c. Estimated date of completion and occupancy;

d. Number of Negro pupils and number of white pupils attending grades to be served by such school who reside in existing or projected attendance area for such school.

20. State as to each teacher and principal first employed by the School Board during the school year 1964-65 and each of the four preceding school terms the following:

a. His or her name, age at time of such employment, sex, race;

b. Initial date of employment by the defendant School Board;

c. Teaching experience prior to employment by defendant School Board;

d. College from which graduated and degrees earned;

e. Major subjects studied in college and in graduate school;

f. Certificate from State Board of Education held at time of initial employment by defendant School Board, date thereof, and specific endorsements thereon;

g. The school and (elementary) grade or (high school) subjects which he was assigned to teach at time of initial employment;

h. Ratings earned for each year since initial employment by defendant School Board.

21. Are any records maintained which reflect the turn-over of teachers in each school?

22. If so, state:

- a. Type of records maintained;
- b. For what periods such records are maintained;
- c. Where they are located;
- d. In whose custody they are maintained.

23. Are any records maintained which reflect the mobility of children in and out of the school system and in and out of specific schools, including transfers and dropouts?

24. If so, state:

- a. Type of records maintained;
- b. Where these records are located;
- c. In whose custody they are maintained.

25. State the amount of funds received through programs of Federal assistance to education during each of the school sessions 1963-64 and 1964-65.

26. State whether any pledge of non-discrimination has been signed by or on behalf of defendant School Board.

27. Give a copy of any plans for desegregation submitted to the Department of Health, Education and Welfare or to any other agency of the State or Federal Government.

PLEASE TAKE NOTICE that a copy of such answers must be served upon the undersigned within fifteen days after service.

/s/ HENRY L. MARSH III
Of Counsel for Plaintiffs

Answer

(Filed June 1, 1965)

The undersigned defendants for Answer to the Complaint exhibited against them say as follows:

1. These defendants deny that the amount in controversy herein exceeds the sum of Ten Thousand Dollars (\$10,000.00) as alleged in paragraph 1 (a) of the Complaint.

2. These defendants deny that this Court has jurisdiction under Title 28, United States Code, Section 1331 or Title 28, United States Code, Section 1343(3) or Title 42, United States Code, Section 1983 to grant any of the relief prayed for in the Complaint.

3. The allegations of paragraphs 2 and 3 of the Complaint are neither admitted or denied but the defendants believe the allegations to be essentially true.

4. These defendants specifically deny that there are questions of law and fact *affecting the rights of all other Negro children attending public schools in the said political subdivision* and call for strict proof thereof and of the fact that it is impracticable to bring all before the Court who desire the relief being sought. These defendants affirmatively allege that, as will hereinafter more fully appear, the Constitutional and statutory rights of all children in the said political subdivision, in so far as public schools are concerned, are protected by the defendants and the desire for the relief being sought is common only to the named plaintiffs.

5. These defendants deny that grounds for a class action exist as alleged in paragraph 5 of the Complaint and

deny that those constituting the group seeking relief herein contributed taxes in excess of \$10,000.00 and call for strict proof.

6. The allegations of paragraphs 6, 7, 8 and 9 of the Complaint are admitted insofar as they assert the existence of various Constitutional and statutory provisions of the Commonwealth of Virginia. These defendants are not required and therefore do not admit or deny the accuracy of the plaintiffs interpretation of the provisions of law to which reference is made.

7. These defendants believe the allegations of paragraph 10 to be correct except that they believe that the Pupil Placement Board would refuse to follow any recommendations which denied an application due to the race of the applicant whether the applicant be Negro or white.

8. These defendants, in answer to paragraph 11 of the Complaint, assert that the assignment procedures available to the plaintiffs afford an adequate means for obtaining all rights to which they are entitled.

9. The allegations of paragraphs 12, 13, 14, 15, 16, 17, 18, 19 and 20 are denied except that the defendants admit having received the petition and letter referred to in paragraphs 13 and 14.

10. Infant plaintiffs and all others eligible to enroll in the pupil schools in the political subdivision are permitted, under existing policy, to attend the school of their choice without regard to race subject only to limitations of space.

WHEREFORE, defendants pray to be dismissed with their costs.

(Signature of Counsel Omitted)

Defendants' Answers to Plaintiffs' Interrogatories

(Filed June 8, 1965)

Now comes Byrd W. Long, Division Superintendent of schools of New Kent County, Virginia, and submits the following answers to interrogatories filed by the plaintiffs, said answers correspond to the numbered paragraphs in the interrogatories, to-wit:

1. a. Date on which each school was erected:

1. New Kent High School erected 1930 (Addition 1934). Elementary Building erected 1954 (Addition 1961).

2. George W. Watkins High School erected 1950. Elementary Building erected 1958 (Addition 1961).

b. Grades served by each school during the 1964-65 school term:

1. New Kent served grades one through twelve.

2. George W. Watkins served grades one through twelve.

c. Planned pupil capacity of each school:

1. New Kent High School 207, New Kent Elementary School 330.

2. George W. Watkins High School 207, George W. Watkins Elementary School 420.

d. Pupils by grades—New Kent (All White)

Elementary: 1-54; 2-61; 3-51; 4-57; 5-48; 6-54; 7-42.

High School: 8-41; 9-49; 10-42; 11-33; 12-20.

e. Pupils by grades—George W. Watkins (All Colored)

Elementary: 1-87; 2-73; 3-94; 4-79; 5-60; 6-77; 7-68.

High School: 8-49; 9-43; 10-34; 11-37; 12-38.

f. Negro school—1 Principal, 1 Librarian, 26 Teachers, 1 Supervisor, 1 Counselor

White school—1 Principal, 1 Librarian, 26 Teachers, 1 Supervisor, 1 Counselor

g. Pupil-teacher ratio at each school during 1964-65 school term: New Kent-22—George W. Watkins-28

h. Average class size for each school during 1964-65 school term, Grades 1-12: New Kent-21—George W. Watkins-26

i. Name and address of principal of each school: Gerald W. Tudor, New Kent High School, New Kent Virginia; Todd W. Dillard, George W. Watkins High School, Quinton, Va.

2. New Kent County has no attendance areas. A map of the County may be obtained from the Virginia Department of Highways.

3. As stated in No. 2 above, New Kent County is not divided into school attendance areas.

4. Eleven school buses transport pupils to the George W. Watkins school. Ten school buses transport pupils to the New Kent School. One bus transports 18 Indian children to a Charles City School. By agreement this bus also transports 60 Charles City children.

White pupils transported—548

Negro pupils transported—710

5. Bus routes in 1963-64 and 1964-65 are the same. See attached maps—names of drivers of buses are shown on maps. (Exhibits A and B)

6. As stated in No. 2 and 3 above, New Kent County is not divided into attendance areas.

7. New Kent County Schools have been operated on a Freedom of Choice Plan administered by the State Pupil Placement Board since the establishment of the Pupil Placement Board. To September 1964, no Negro pupil had applied for admission to the New Kent School and no White pupil had applied for admission to the George W. Watkins School.

8. Both schools are crowded beyond capacity in the high school departments.

New Kent High School: Two basement areas, a conference room, stage dressing room, and the auditorium are used for classes.

George W. Watkins High School: Two basement areas, clinic room, and a part of the Vocational Shop are used for classes.

9. Distributive Education is not offered in either school.

10. There are special teachers for subjects such as art and music.

11. a. New Kent High School—Part-time music teacher. George W. Watkins High School—Part-time music

teacher. New Kent Elementary School—Part-time music teacher.

b. One—New Kent School—Full time.

c. One—George W. Watkins School—Part-time.

d. Stated in b. and c.

e. Same as stated in b. and c.

12. Vocational Home Economics and Vocational Agriculture were offered in both schools during 1963-64 and during 1964-65.

13. Substantially the same for 1964-65 and 1963-64.

New Kent High School offered Vocational Agriculture and Home Economics. Vocational Agriculture: 1 teacher, 63 pupils. Home Economics: 1 teacher, 32 pupils.

George W. Watkins High School offered Vocational Agriculture and Home Economics. Vocational Agriculture: 1 teacher, 52 pupils. Home Economics: 1 teacher, 56 pupils.

14. New Kent County has no junior high schools. Each of the two schools are operated on the plan called the 7-5 plan, which consists of 7 elementary grades and 5 high school grades.

Each high school offers the following: Academic Curriculum, Vocational Curriculum, General Course.

The Academic Curriculum is geared mainly for pupils preparing for college.

The Vocational Course is offered pupils not planning for college, and a boy may major in Agriculture; a girl in Home Making; and a boy or girl may major in Commercial courses.

Those pupils planning to seek work in general employment may enroll in a general course.

Each high school has a guidance counselor who attempts to aid the pupil and parent in the selection of a course according to the pupil's aptitude and his desired type of employment after graduation.

15. New Kent County has no Seventh grade pupils who take courses in the high school department.

Each school in New Kent County is a combination high school and elementary school, but teachers do not work partly in high school and partly in elementary school.

16. The School Board of New Kent County offers no summer school program in any school.

17. At the George W. Watkins School the Agriculture building is a frame building.

18. Extensive repairs were made at both schools during the summer of 1963 and 1964. No major repairs are needed at either school at the present time.

19. a. New Kent School—campus type addition. George W. Watkins School campus type addition.

b. New Kent School—4 classrooms planned; 2 seventh grade classrooms; 2 sixth grade classrooms; two toilets to serve the four rooms. This addition will serve 6th & 7th grade pupils at the above school. George

W. Watkins School—4 classrooms planned: 2 seventh grade classrooms; 2 sixth grade classrooms; two toilets to serve the four rooms. This addition will serve 6th & 7th grade pupils at the above school.

c. A completion date has not been set for this project as State Literary Loan funds have not been released.

The two above projects will be let to bid at the same time and one contract will be executed for both of the projects.

d. New Kent County has no attendance areas.

20. George W. Watkins High School and Grade School:

a. Todd W. Dillard, Principal, Male, age 30, Negro

b. Employed April, 1964, effective July 1, 1964

c. Four years experience

d. B.S. Virginia State College—Work completed for Masters Degree

e. Science and Mathematics Major

f. Collegiate Professional Certificate

g. Does not teach—full-time Principal

h. Rated as superior

New Kent High School and Grade School:

a. Gerald W. Tudor, Principal, Male, age 28, White

b. Employed July 14, 1964

c. Five years experience

d. B.S. East Carolina College—Work completed for Masters Degree

- e. Physical Education
- f. Collegiate Professional Certificate
- g. Does not teach—full-time Principal

For information regarding teachers, see attached Exhibit "C".

21. Records in the School Board Office will reflect the turnover of teachers in each school.

22. Contract with teachers are executed annually for a period of one year. A report of teachers contracted with for each year is filed in the school board office.

- a. As stated above
- b. For past 5 years
- c. School Board Office
- d. The Clerk of the School Board

23. Teachers' attendance registers record entries, re-entries and withdrawals. No other special records are kept.

24. Teachers registers

- a. Same as above
- b. School Board Office
- c. Clerk of School Board

25. Federal Funds 1963-64

School Lunch	\$ 4,554.68
PL 874	9,612.00
NDEA	1,572.00
Guidance	2,000.00

Total	\$17,738.68
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Federal Funds—Estimated—1964-65

School Lunch	\$ 5,500.00
PL 874	9,800.00
NDEA	1,750.00
Guidance	2,000.00
<hr/>	
Total	\$19,050.00

26. Yes

HEW Form 441

27. Plan to accompany HEW Form 441 has not been completed at this date.

/s/ BYRD W. LONG

Byrd W. Long, Division Superin-
tendent of Schools of New Kent
County, Virginia

• • • • •

Exhibit C**20. Continued**

Paul Gilley, age 22, white, male, b. 1963, c. None, d. V.P.I., B.S., e. Agriculture, f. Collegiate Professional, Agricultural, g. Agriculture, New Kent High School, h. Teachers are not rated in this Division.

Edward J. Stansfield, age 24, white, male, b. 1961, c. None, d. Houghton, B.A., e. Sociology, f. Collegiate, Sociology, History, English, g. History, English, New Kent High School.

Billy R. Ricks, age 21, white, male, b. 1964, c. None, d. East Carolina, B.A., e. History and Social Science, f. Collegiate History and Social Science, g. History, New Kent High School.

John E. Averett, age 25, white, male, b. 1963, c. 2 years, d. University of Richmond, no degree, e. Physical Education, f. Special License, g. Math, Physical Education, New Kent High School.

Jayne P. Thomas, age 31, white, female, b. 1962, c. 2 years, d. Madison, B.M. Education, e. Music, f. Collegiate Professional, Music, g. Music, New Kent High and Elementary School.

Mary W. Potts, age 38, white, female, b. 1963, c. 4 years, d. Longwood, B.S., e. English, Chemistry, f. Collegiate Professional 6th and 7th grades, g. 7th grade, New Kent Elementary School.

Alice V. Fisher, age 56, white, female, b. 1963, c. 16 years, d. Mary Washington, no degree, e. Elementary Education, f. Special License, g. 5th grade, New Kent Elementary.

Shirley F. Francisco, age 31, white, female, b. 1964, c. 2 years, d. Madison, no degree, e. Elementary Education, f. Special License, g. 2nd grade, New Kent Elementary.

Patricia B. Averett, age 20, white, female, b. 1963, c. None, d. Ferrum, no degree, e. Elementary Education, f. Special License, g. 1st grade, New Kent Elementary School.

Murray Carson, age 53, white, male, b. 1964, c. None, d. Averett, no degree, e. English and History, f. Special License, g. 1/2 day English, New Kent High School.

Laurenstine Porter, age 22, Negro, female, b. 1964, c. None, d. North Carolina College B.S., e. Library, f. Collegiate, Health and Physical Education, Library Science, g. Librarian, G. W. Watkins High & Elementary School.

Guy A. Boykins, age 57, Negro, male, b. 1960, c. None, d. Virginia Union University, A.B., e. Social Studies and History, f. Collegiate Professional, English, g. Social Studies and History, G. W. Watkins High School.

James E. Coleman, age 23, Negro, male, b. 1964, c. None, d. Virginia Union, no degree, e. Chemistry, f. Special License, Science and Physical Education, g. Science and Physical Education, G. W. Watkins High School.

Edith Jackson, age 24, Negro, female, b. 1960, c. None, d. Virginia Union, B.S., e. Business, f. Collegiate Professional, Business, g. Commercial, G. W. Watkins High School.

Gloria Miller, age 41, Negro, female, b. 1964, c. 2 years, d. Virginia Union, B.A., e. Elementary, f. Collegiate Professional—English and History, g. English and French, G. W. Watkins High School.

John A. Baker, age 39, Negro, male, b. 1961, c. 13 years, d. Wilburforce University, B.S., e. Agriculture, f. Collegiate Professional, g. Agriculture, G. W. Watkins High School.

Charles J. Washington, Sr., age 53, Negro, male, b. 1962, c. None, d. Virginia Union, B.A., e. English, f. Collegiate Professional—English and Latin, g. English, G. W. Watkins High School.

Seth Pruden, age 37, Negro, male, b. 1960, c. None, d. Virginia Union, B.S., e. History, f. Collegiate Professional—French and History, g. 7th grade, G. W. Watkins Elementary School.

Phillip Battle, age 24, Negro, male, b. 1963, c. None, d. St. Paul's, B.A., e. History and Social Sciences, f. Collegiate—History and Social Sciences, g. 7th grade, G. W. Watkins Elementary School.

Natalie Boykins, age 24, Negro, female, b. 1964, c. 2 years, d. Virginia State, B.A., e. Sociology, f. Collegiate—Sociology, g. 6th grade, G. W. Watkins Elementary School.

Julia Boyce, age 34, Negro, female, b. 1961, c. 10 years, d. Virginia State, B.S., e. English and Physical Education, f. Collegiate Professional—All grade subjects in 6th and 7th, g. 5th grade, G. W. Watkins Elementary School.

Willie Gillenwater, age 34, Negro, female, b. 1963, c. 2, d. Virginia Union, B.A., e. Elementary Education, f. Collegiate Professional—English, g. 4th grade, G. W. Watkins School—Elementary.

Audrey Dillard, age 28, Negro, female, b. 1963, c. 6 years, d. Virginia State, A.B., e. Social Studies, f. Collegiate Professional—History, g. 4th Grade, G. W. Watkins School—Elementary.

Dorothy Joyner, age 28, Negro, female, b. 1961, c. 3 years, d. Winston Salem, B.S., e. English & History, f. Collegiate Professional—Elementary, g. 2nd grade, G. W. Watkins School—Elementary.

Susie Bates, age 23, Negro, female, b. 1962, c. None, d. Virginia State, B.S., e. Elementary, f. Collegiate Professional—Grades 1-7, g. 1st grade, G. W. Watkins School—Elementary.

Plan for School Desegregation

(Filed May 10, 1966)

NEW KENT COUNTY PUBLIC SCHOOLS PROVIDENCE FORGE, VIRGINIA

I. ANNUAL FREEDOM OF CHOICE OF SCHOOLS

A. The County School Board of New Kent County has adopted a policy of complete freedom of choice to be offered in grades 1, 2, 8, 9, 10, 11, and 12 of all schools without regard to race, color, or national origin, for 1965-66 and all grades after 1965-66.

B. The choice is granted to parents, guardians and persons acting as parents (hereafter called "parents") and their children. Teachers, principals and other school personnel are not permitted to advise, recommend or otherwise influence choices. They are not permitted to favor or penalize children because of choices.

II. PUPILS ENTERING FIRST GRADE

Registration for the first grade will take place, after conspicuous advertising two weeks in advance of registration, between April 1 and May 31 from 9:00 A. M. to 2:00 P. M.

When registering, the parent will complete a Choice of School Form for the child. The child may be registered at any elementary school in this system, and the choice made may be for that

school or for any other elementary school in the system. The provisions of Section VI of this plan with respect to overcrowding shall apply in the assignment to schools of children entering first grade.

III. PUPILS ENTERING OTHER GRADES

- A. Each parent will be sent a letter annually explaining the provisions of the plan, together with a Choice of School Form and a self-addressed return envelope, by April 1 of each year for pre-school children and May 15 for others. Choice forms and copies of the letter to parents will also be readily available to parents or students and the general public in the school offices during regular business hours. Section VI applies.
- B. The Choice of School Form must be either mailed or brought to any school or to the Superintendent's Office by May 31st of each year. Pupils entering grade one (1) of the elementary school or grade eight (8) of the high school must express a choice as a condition for enrollment. Any pupil in grades other than grades 1 and 8 for whom a choice of school is not obtained will be assigned to the school he is now attending.

IV. PUPILS NEWLY ENTERING SCHOOL SYSTEM OR CHANGING RESIDENCE WITHIN IT

- A. Parents of children moving into the area served by this school system, or changing their residence within it, after the registration period is com-

pleted but before the opening of the school year, will have the same opportunity to choose their children's school just before school opens during the week of August 30th, by completing a Choice of School Form. The child may be registered at any school in the system containing the grade he will enter, and the choice made may be for that school or for any other such school in the system. However, first preference in choice of schools will be given to those whose Choice of School Form is returned by the final date for making choice in the regular registration period. Otherwise, Section VI applies.

- B. Children moving into the area served by this school system, or changing their residence within it, after the late registration period referred to above but before the next regular registration period, shall be provided with registration forms. This has been done in the past.

V. RESIDENT AND NON-RESIDENT ATTENDANCE

This system will not accept non-resident students, nor will it make arrangements for resident students to attend public schools in other school systems where either action would tend to preserve segregation or minimize desegregation. Any arrangement made for non-resident students to attend public schools in this system, or for resident students to attend public schools in another system, will assure that such students will be assigned without regard to race, color, or national origin, and such arrangement will be ex-

plained fully in an attachment made a part of this plan. Agreement attached for Indian children.

VI. OVERCROWDING

- A. No choice will be denied for any reason other than overcrowding. Where a school would become overcrowded if all choices for that school were granted, pupils choosing that school will be assigned so that they may attend the school of their choice nearest to their homes. No preference will be given for prior attendance at the school.
- B. The Board plans to relieve overcrowding by building during 1965-66 for the 1966-67 session.

VII. TRANSPORTATION

Transportation will be provided on an equal basis without segregation or other discrimination because of race, color, or national origin. The right to attend any school in the system will not be restricted by transportation policies or practices. To the maximum extent feasible, busses will be routed so as to serve each pupil choosing any school in the system. In any event, every student eligible for bussing shall be transported to the school of his choice if he chooses either the formerly white, Negro or Indian school.

VIII. SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

There shall be no discrimination based on race, color, or national origin with respect to any ser-

vices, facilities, activities and programs sponsored by or affiliated with the schools of this school system.

IX. STAFF DESEGREGATION

- A. Teacher and staff desegregation is a necessary part of school desegregation. Steps shall be taken beginning with school year 1965-66 toward elimination of segregation of teaching and staff personnel based on race, color, or national origin, including joint faculty meetings, in-service programs, workshops, other professional meetings and other steps as set forth in Attachment C.
- B. The race, color, or national origin of pupils will not be a factor in the initial assignment to a particular school or within a school of teachers, administrators or other employees who serve pupils, beginning in 1966-67.
- C. This school system will not demote or refuse to reemploy principals, teachers and other staff members who serve pupils, on the basis of race, color, or national origin; this includes any demotion or failure to reemploy staff members because of actual or expected loss of enrollment in a school.
- D. Attachment D hereto consists of a tabular statement, broken down by race, showing: 1) the number of faculty and staff members employed by this system in 1964-65; 2) comparable data for 1965-66; 3) the number of such personnel demoted, discharged or not reemployed for 1965-66; 4)

the number of such personnel newly employed for 1965-66. Attachment D further consists of a certification that in each case of demotion, discharge or failure to reemploy, such action was taken wholly without regard to race, color, or national origin.

X. PUBLICITY AND COMMUNITY PREPARATION

Immediately upon the acceptance of this plan by the U. S. Commissioner of Education, and once a month before final date of making choices in 1966, copies of this plan will be made available to all interested citizens and will be given to all television and radio stations and all newspapers serving this area. They will be asked to give conspicuous publicity to the plan in local news section of the Richmond papers. The newspaper coverage will set forth the text of the plan, the letter to parents and Choice of School Form. Similar prominent notice of the choice provision will be arranged for at least once a month thereafter until the final date for making choice. In addition, meetings and conferences have been and will be called to inform all school system staff members of, and to prepare them for, the school desegregation process, including staff desegregation. Similar meetings will be held to inform Parent-Teacher Associations and other local community organizations of the details of the plan, to prepare them for the changes that will take place.

XI. CERTIFICATION

This plan of desegregation was duly adopted by the New Kent County School Board at a meeting duly called and held on August 2, 1965.

Signed:

(Chairman, Superintendent or
other authorized official)

.....
(title of signing officer)

Attachment A

(School Board Letterhead)

Date Sent to Parents
and Guardians:

May 15, 1966

CHOICE OF SCHOOL FORM

This form is provided for you to choose a school for your child to go to next year. The form must be either mailed or brought to any school or to the Superintendent's office at the address above by May 31, 1966.

1. Name of Child

Last

First

Middle

2. Date of Pupil's Birth (if entering first grade)

Month

Day

Year

3. Grade Pupil Eligible for

4. School Last Attended

5. School Chosen (Mark X beside school chosen)

- ☐ George W. Watkins High and Elementary
1-12 Quinton, Virginia
- ☐ New Kent High and Elementary
1-12 New Kent, Virginia
- ☐ Samaria School (Indian)
1-12 Charles City, Va.

Signature

~~Address~~

Date

This block is to be filled in by the Superintendent's office,
not by parents. School chosen: School as-
signed to: If different, explain:

.....

Attachment B**(School Board Letterhead)****May 15, 1966****Dear Parent:**

A plan for the desegregation of our school system has been put into effect so that our schools will operate in all respects without regard to race, color, or national origin.

The desegregation plan provides that each pupil and his parent or guardian has the absolute right to choose each year the school the pupil will attend. No teacher, principal, or other school official is permitted to advise you, or make recommendations or otherwise influence your decision. No child will be favored or penalized because of the choice made.

Attached is a Choice of School Form listing the names and locations of all schools in our system and the grades they include. Please mark a cross beside the school you choose, and return the form in the enclosed envelope or bring it to any school or the Superintendent's office by May 31, 1966.

No choice will be denied for any reason other than overcrowding. Anyone whose choice is denied because of overcrowding will be offered his choice from among all other schools in the system where space is available in his grade.

School bus routes will be on a desegregated basis. There will be no discrimination based on race, color, or national origin in any school-connected services, facilities, activities and programs.

For pupils entering grades one (1) and eight (8) a Choice of School Form must be filled out as a requirement for enrollment. Children in other grades for whom no choice is made will be assigned to the school they are presently attending.

Sincerely yours,

Superintendent

Attachment C**Additional Steps Toward Staff Desegregation**

Below are possible steps toward faculty and staff desegregation which have been taken in other school systems and one or more of which you may deem appropriate for your system to adopt at this time. Please indicate by checking the appropriate box or boxes and attach this page to the plan when submitting it.

1. ☒ All members of the supervisory staff will be assigned to serve schools, teachers and pupils without regard to race, color or national origin.
2. ☐ Teachers and staff members who serve more than one school, such as librarians, music and art teachers, nurses, counselors will be assigned to serve schools, teachers and pupils without regard to race, color, or national origin.
3. ☐ During the first semester of 1965-66, "pioneer teachers" of both races will be selected and given special preparation and, during the second semester of school year 1965-66, assigned to exchange classrooms and schools periodically.
4. ☐ Institutions, agencies, organizations and individuals that refer teachers and staff to school systems in this State will, during school year 1965-66 be informed of this school system's policy of nondiscrimination in filling positions for serving pupils in this school system and they will be asked to so inform persons seeking referrals.

5. ☐ In the future, there will be no requirement or request for the photograph of or racial identification of applicants for employment, reemployment or reassignment.
6. ☐ All teaching vacancies will be prominently posted in all schools and applicants will be considered without regard to race, color or national origin.
7. ☐ No new teacher will hereafter be employed who is not willing to work on a completely desegregated basis.
8. ☐ Other steps as follows:

First Memorandum of the District Court

(Filed May 17, 1966)

The infant plaintiffs, as pupils or prospective pupils in the public schools of New Kent County, and their parents or guardians have brought this class action asking that the defendants be required to adopt and implement a plan which will provide for the prompt and efficient racial desegregation of the county schools, and that the defendants be enjoined from building schools or additions and from purchasing school sites pending the court's approval of a plan. The plaintiffs also seek attorney's fees and costs.

The defendants have moved to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted. They have also answered denying the material allegations of the bill.

The facts are uncontested.

New Kent is a rural county located east of the City of Richmond. Its school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The school board operates one white combined elementary and high school, and one Negro combined elementary and high school. There are no attendance zones. Each school serves the entire county. Indian students attend a school in Charles City County.

On August 2, 1965 the county school board adopted a freedom of choice plan to comply with Title VI of the Civil Rights Act of 1964, 42 U. S. C. §2000.d-1, *et seq.* The choices include the Indian school in Charles City County. The county had operated under the Pupil Placement Act, §§22-232.1, *et seq.*, Code of Virginia, 1950, as amended. As of September 1964 no Negro pupil had applied for

admission to the white school. No Negro faculty member serves in the white school and no white faculty member serves in the Negro school.

New construction is scheduled at both county schools.

The case is controlled by the principles expressed in *Wright v. School Bd. of Greenville County, Va.*, No. 4263 (E. D. Va., Jan. 27, 1966). An order similar to that entered in *Greenville* will deny an injunction restraining construction and grant leave to submit an amendment to the plan for employment and assignment of staff on a non-racial basis. The motion for counsel fees will be denied.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

First Order of the District Court

(Filed May 17, 1966)

For reasons stated in the Memorandum of the Court this day filed in the Memorandum of the Court in *Wright v. County School Board of Greenville County, Virginia*, Civil Action No. 4263 (E. D. Va., Jan. 27, 1966),

It is ADJUDGED and ORDERED:

1. The defendants' motion to dismiss is denied;
2. The plaintiffs' prayer for an injunction restraining school construction and the purchase of school sites is denied;
3. The defendants are granted leave to submit on or before June 6, 1966 amendments to their plan which will provide for employment and assignment of the staff on a non-racial basis. Pending receipt of these amendments, the court will refer approval of the plan and consideration of other injunctive relief;
4. The plaintiffs' motion for counsel fees is denied;
5. The case will be retained upon the docket with leave granted to any party to petition for further relief.

The plaintiffs shall recover their costs to date.

Let the Clerk send copies of this order and the Memorandum of the Court to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

Defendants' Plan Supplement**(Filed June 6, 1966)**

The School Board of New Kent County recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the school systems without regard to race, color or national origin. We further recognize our obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color.

The New Kent Board recognizes the fact that New Kent County has a problem which differs from most counties in that the white citizens are the minority group. The Board is also cognizant of the fact that race relations are generally good in this county, and Negro citizens share in county government. A Negro citizen is a member of the County Board of Supervisors at the present time.

In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other staff members among the various schools of this system will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools.

The following procedures will be followed to carry out the above stated policy:

1. The best person will be sought for each position without regard to race, and the Board will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties. We will not select a person of less ability just to accomplish desegregation.

2. Institutions, agencies, organization, and individuals that refer teacher applicants to the school system will be informed of the above stated policy for faculty desegregation and will be asked to so inform persons seeking referrals.
3. The School Board will take affirmative steps to allow teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.
4. No new teacher will be hereafter employed who is not willing to accept assignment to a desegregated faculty or in a desegregated school.
5. All Workshops and in-service training programs are now and will continue to be conducted on a completely desegregated basis.
6. All members of the supervisory staff will be assigned to cover schools, grades, teachers and pupils without regard to race, color or national origin.
7. All staff meetings and committee meetings that are called to plan, choose materials, and to improve the total educational process of the division are now and will continue to be conducted on a completely desegregated basis.
8. All custodial help, cafeteria workers, maintenance workers, bus mechanics and the like will continue to be employed without regard to race, color or national origin.
9. Arrangements will be made for teachers of one race to visit and observe a classroom consisting of a teacher and pupils of another race to promote acquaintance and understanding.

Plaintiffs' Exception to Plan Supplement

(Filed June 10, 1966)

The plaintiffs take exception to the defendants' Plan Supplement adopted May 23, 1966 and filed herein pursuant to leave granted in this Court's order of May 17, 1966 to submit amendments which will provide for employment and assignment of the staff on a non-racial basis.

I

The Supplement does not contain well-defined procedures which will be put into effect on definite dates. The Supplement does not even provide the "token assignments" which this Court warned would not suffice.

II

In all reality, the Supplement states the defendant school board's refusal to take any initiative to desegregate the faculties of the several schools.

WHEREFORE, the plaintiffs pray that their exceptions be sustained and that the defendants be required to forthwith eliminate all facets of racial segregation and discrimination with respect to administrative personnel, teachers, clerical, custodial and other employees, transportation and other facilities, and the assignment of pupils to schools and classrooms in the public schools of ~~New~~ Kent County and that the defendants be required to establish geographic attendance areas for each public school in said county and assign each child to the school so designated to serve his area of residence.

/s/ S. W. TUCKER
Of Counsel for Plaintiffs

Memorandum of the Court

(Filed June 28, 1966)

This memorandum supplements the memorandum of the court filed May 17, 1966. The court deferred ruling on the school board's plan of desegregation until after the board had an opportunity to amend the plan to provide for allocation of faculty and staff on a non-racial basis. The board has filed a supplement to the plan to accomplish this purpose.

The plan and supplement are:

I.**ANNUAL FREEDOM OF CHOICE OF SCHOOLS**

A. The County School Board of New Kent County has adopted a policy of complete freedom of choice to be offered in grades 1, 2, 8, 9, 10, 11, and 12 of all schools without regard to race, color, or national origin, for 1965-66 and all grades after 1965-66.

B. The choice is granted to parents, guardians and persons acting as parents (hereafter called 'parents') and their children. Teachers, principals and other school personnel are not permitted to advise, recommend or otherwise influence choices. They are not permitted to favor or penalize children because of choices.

II.**PUPILS ENTERING OTHER GRADES**

Registration for the first grade will take place, after conspicuous advertising two weeks in advance of registration, between April 1 and May 31 from 9:00 A.M. to 2:00 P.M.

When registering, the parent will complete a Choice of

Memorandum of the Court

School Form for the child. The child may be registered at any elementary school in this system, and the choice made may be for that school or for any other elementary school in the system. The provisions of Section VI of this plan with respect to overcrowding shall apply in the assignment to schools of children entering first grade.

III.

PUPILS ENTERING OTHER GRADES

A. Each parent will be sent a letter annually explaining the provisions of the plan, together with a Choice of School Form and a self-addressed return envelope, by April 1 of each year for pre-school children and May 15 for others. Choice forms and copies of the letter to parents will also be readily available to parents or students and the general public in the school offices during regular business hours. Section VI applies.

B. The Choice of School Form must be either mailed or brought to any school or to the Superintendent's Office by May 31st of each year. Pupils entering grade one (1) of the elementary school or grade eight (8) of the high school must express a choice as a condition for enrollment. Any pupil in grades other than grades 1 and 8 for whom a choice of school is not obtained will be assigned to the school he is now attending.

IV.

PUPILS NEWLY ENTERING SCHOOL SYSTEM OR
CHANGING RESIDENCE WITHIN IT

A. Parents of children moving into the area served by this school system, or changing their residence within it,

Memorandum of the Court

after the registration period is completed but before the opening of the school year, will have the same opportunity to choose their children's school just before school opens during the week of August 30th, by completing a Choice of School Form. The child may be registered at any school in the system containing the grade he will enter, and the choice made may be for that school or for any other such school in the system. However, first preference in choice of schools will be given to those whose Choice of School Form is returned by the final date for making choice in the regular registration period. Otherwise, Section VI applies.

B. Children moving into the area served by this school system, or changing their residence within it, after the late registration period referred to above but before the next regular registration period, shall be provided with registration forms. This has been done in the past.

V.

RESIDENT AND NON-RESIDENT ATTENDANCE

This system will not accept non-resident students, nor will it make arrangements for resident students to attend public schools in other school systems where either action would tend to preserve segregation or minimize desegregation. Any arrangement made for non-resident students to attend public schools in this system, or for resident students to attend public schools in another system, will assure that such students will be assigned without regard to race, color, or national origin, and such arrangement will be explained fully in an attachment made a part of this plan. Agreement attached for Indian children.

Memorandum of the Court

VI.

OVERCROWDING

A. No choice will be denied for any reason other than overcrowding. Where a school would become overcrowded if all choices for that school were granted, pupils choosing that school will be assigned so that they may attend the school of their choice nearest to their homes. No preference will be given for prior attendance at the school.

B. The Board plans to relieve overcrowding by building during 1965-66 for the 1966-67 session.

VII.

TRANSPORTATION

Transportation will be provided on an equal basis without segregation or other discrimination because of race, color, or national origin. The right to attend any school in the system will not be restricted by transportation policies or practices. To the maximum extent feasible, busses will be routed so as to serve each pupil choosing any school in the system. In any event, every student eligible for bussing shall be transported to the school of his choice if he chooses either the formerly white, Negro or Indian school.

VIII.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

There shall be no discrimination based on race, color, or national origin with respect to any services, facilities, activities and programs sponsored by or affiliated with the schools of this school system.

Memorandum of the Court

IX.

STAFF DESEGREGATION

A. Teacher and staff desegregation is a necessary part of school desegregation. Steps shall be taken beginning with school year 1965-66 toward elimination of segregation of teaching and staff personnel based on race, color, or national origin, including joint faculty meetings, in-service programs, workshops, other professional meetings and other steps as set forth in Attachment C.

B. The race, color, or national origin of pupils will not be a factor in the initial assignment to a particular school or within a school of teachers, administrators or other employees who serve pupils, beginning in 1966-67.

C. This school system will not demote or refuse to re-employ principals, teachers and other staff members who serve pupils, on the basis of race, color, or national origin; this includes any demotion or failure to reemploy staff members because of actual or expected loss of enrollment in a school.

D. Attachment D hereto consists of a tabular statement, broken down by race, showing: 1) the number of faculty and staff members employed by this system in 1964-65; 2) comparable data for 1965-66; 3) the number of such personnel demoted, discharged or not re-employed for 1965-66; 4) the number of such personnel newly employed for 1965-66. Attachment D further consists of a certification that in each case of demotion, discharge or failure to re-employ, such action was taken wholly without regard to race, color, or national origin.

*Memorandum of the Court***X.****PUBLICITY AND COMMUNITY PREPARATION**

Immediately upon the acceptance of this plan by the U. S. Commissioner of Education, and once a month before final date of making choices in 1966, copies of this plan will be made available to all interested citizens and will be given to all television and radio stations and all newspapers serving this area. They will be asked to give conspicuous publicity to the plan in local news sections of the Richmond papers. The newspaper coverage will set forth the text of the plan, the letter to parents and Choice of School Form. Similar prominent notice of the choice provision will be arranged for at least one a month thereafter until the final date for making choice. In addition, meetings and conferences have been and will be called to inform all school system staff members of, and to prepare them for, the school desegregation process, including staff desegregation. Similar meetings will be held to inform Parent-Teacher Associations and other local community organizations of the details of the plan, to prepare them for the changes that will take place.

SUPPLEMENT

"The School Board of New Kent County recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the school systems without regard to race, color or national origin. We further recognize our obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color.

Memorandum of the Court

"The New Kent Board recognizes the fact that New Kent County has a problem which differs from most counties in that the white citizens are the minority group. The Board is also cognizant of the fact that race relations are generally good in this county, and Negro citizens share in county government. A Negro citizen is a member of the County Board of Supervisors at the present time.

"In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other staff members among the various schools of this system will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools.

"The following procedures will be followed to carry out the above stated policy:

1. The best person will be sought for each position without regard to race, and the Board will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties. We will not select a person of less ability just to accomplish desegregation.

2. Institutions, agencies, organization, and individuals that refer teacher applicants to the schools system will be informed of the above stated policy for faculty desegregation and will be asked to so inform persons seeking referrals.

3. The School Board will take affirmative steps to allow teachers presently employed to accept transfers to schools in which the majority of the faculty members

Memorandum of the Court

are of a race different from that of the teacher to be transferred.

4. No new teacher will be hereafter employed who is not willing to accept assignment to a desegregated faculty or in a desegregated school.

5. All workshops and in-service training programs are now and will continue to be conducted on a completely desegregated basis.

6. All members of the supervisory staff will be assigned to cover schools, grades, teachers and pupils without regard to race, color or national origin.

7. All staff meetings and committee meetings that are called to plan, choose materials, and to improve the total educational process of the division are now and will continue to be conducted on a completely desegregated basis.

8. All custodial help, cafeteria workers, maintenance workers, bus mechanics and the like will continue to be employed without regard to race, color or national origin.

9. Arrangements will be made for teachers of one race to visit and observe a classroom consisting of a teacher and pupils of another race to promote acquaintance and understanding."

The plaintiffs filed exceptions to the supplement charging that it does not contain well defined procedures which will be put into effect on definite dates and that it demonstrates the board's refusal to take any initiative to desegregate the staff.

Memorandum of the Court

The plan for faculty desegregation is not as definite as some plans received from other school districts. The court is of the opinion, however, that no rigid formula should be required. The plan will enable the school board to achieve allocation of faculty and staff on a non-racial basis. The plan and supplement satisfy the criteria mentioned in *Wright v. School Board of Greensville County, Va.*, No. 4263 (E.D. Va., Jan. 27 and May 13, 1966).

Provision should be made for a registration period in the summer or immediately prior to the beginning of the 1966-67 term to allow pupils to exercise their choice of school. This is necessary because the supplement to the plan was adopted late in the school year. The summer or fall registration should present no administrative difficulties. Many of the schools which have adopted a freedom of choice plan provide for such registration as a matter of course.

It may become necessary for the board to modify the plan. It may become necessary to revoke in full or in part the approval that the court has given the plan. The case will remain on the docket for any of the parties to seek relief which future circumstances may require.

/s/ JOHN D. BUTZNER, JR.

United States District Judge

Order**(Entered June 28, 1966)**

For reasons stated in the memorandum of the court this day filed and in *Wright v. School Board of Greenville County, Va.*, No. 4263 (E.D. Va., Jan. 27 and May 13, 1966), it is ADJUDGED and ORDERED that the plan adopted by the New Kent County School Board is approved.

This case will be retained on the docket with leave granted to any party to seek further relief.

Let the Clerk send copies of this order and of the memorandum of the court to counsel of record.

/s/ **JOHN D. BUTZNER, JR.**
United States District Judge

**Decision of the United States Court of Appeals
For the Fourth Circuit**

No. 10,792.

Charles C. Green, Carroll A. Green and Robert C. Green,
infants, by Calvin C. Green and Mary O. Green,
their father and mother and next friends,
and all others of the plaintiffs,
Appellants,

versus

County School Board of New Kent County, Virginia, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

JOHN D. BUTZNER, JR., DISTRICT JUDGE. —

(Argued January 9, 1967. Decided June 12, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN,
BRYAN, J. SPENCER BELL,* WINTER and CRAVEN, Circuit
Judges, sitting en banc.

S. W. Tucker (Henry L. Marsh, III, Willard H. Douglas,
Jr., Jack Greenberg and James M. Nabrit, III, on brief)
for Appellants, and Frederick T. Gray (Williams, Mullen
& Christian on brief) for Appellees.

* Judge Bell sat as a member of the Court when the case was heard
but died before it was decided.

S

*Decision of the United States Court of Appeals
For the Fourth Circuit*

PER CURIAM :

The questions presented in this case are substantially the same as those we have considered and decided today in *Bowman v. County School Bd. of Charles City County*.¹ For the reasons stated there, the rulings of the District Court merit our substantial approval, but the case is necessarily remanded for further proceedings in accordance with the District Court's order and our opinion in *Bowman*.

Remanded.

¹ 4 Cir. F.2d (Decided this day). The special concurring opinion of Judge Sobeloff, in which Judge Winter joins, in *Bowman* is applicable to this case also.

**Opinion of the United States Court of Appeals
For the Fourth Circuit**

No. 10,793.

Shirlette L. Bowman, Rhoda M. Bowman, Mildred A.
Bowman, Richard M. Bowman and Sandra L. Bowman,
infants, by Richard M. Bowman, their father and next
friend, and all others of the plaintiffs,
Appellants,

versus

County School Board of Charles City County,
Virginia, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued January 9, 1967. Decided June 12, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN,
BRYAN, J. SPENCER BELL,* WINTER and CRAVEN, Circuit
Judges, sitting en banc.

S. W. Tucker (Henry L. Marsh, III, Willard H. Douglas,
Jr., Jack Greenberg and James M. Nabrit, III, on brief)
for Appellants, and Frederick T. Gray (Williams, Mullen
& Christian on brief) for Appellees.

* Judge Bell sat as a member of the Court when the case was heard
but died before it was decided.

*Opinion of the United States Court of Appeals
For the Fourth Circuit*

HAYNSWORTH, Chief Judge:

In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged "unrestricted right" to attend any school in the system he wishes. They contend that compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention, though a related point affecting the assignment of teachers is not without merit.

I

"Freedom of choice" is a phrase of many connotations.

Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria, it is an illusion and an oppression which is constitutionally impermissible. Long since, this court has condemned it.¹ The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents. It is the duty of the school boards to eliminate the discrimination which inheres in such a system.

Employed as descriptive of a system in which each pupil, or his parents, must annually exercise an uninhibited choice, and the choices govern the assignments, it is a very different

¹ *Nesbit v. Statesville City Bd. of Educ.*, 4 Cir., 345 F.2d 333, 334 n. 3; *Bradley v. School Bd. of Educ. of City of Richmond*, 4 Cir., 345 F.2d 310, 319 & n. 18; *Wheeler v. Durham City Bd. of Educ.*, 4 Cir., 309 F.2d 630, 633; *Jeffers v. Whitley*, 4 Cir., 309 F.2d 621; *Marsh v. County School Bd. of Roanoke County*, 4 Cir., 305 F.2d 94; *Green v. School Bd. of City of Roanoke*, 4 Cir., 304 F.2d 118; *Hill v. School Bd. of City of Norfolk*, 4 Cir., 282 F.2d 473; *Jones v. School Bd. of City of Alexandria*, 4 Cir., 278 F.2d 72.

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For the Fourth Circuit*

thing. If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held,² and we adhere to our holdings.

Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for "freedom of choice" is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them.

A panel of the Fifth Circuit³ recently had occasion to concentrate its guns upon the sort of "freedom of choice" plan we have not tolerated, but, significantly, the decree it prescribed for its district courts requires the kind of "freedom of choice" plan we have held requisite and embodies standards no more exacting than those we have imposed and sanctioned.

The fact that the Department of Health, Education and Welfare has approved the School Board's plan is not determinative. The actions of that department, as its guidelines, are entitled to respectful consideration, for, in large mea-

² *Wheeler v. Durham City Bd. of Educ.*, 4 Cir., 346 F.2d 768, 773; *Bradley v. School Bd. of Educ. of City of Richmond*, 4 Cir., 345 F.2d 310, 313, *vacated and remanded on other grounds*, 382 U.S. 103. See *Jeffers v. Whitley*, 4 Cir., 309 F.2d 621.

³ *United States v. Jefferson County Board of Education*, 5 Cir., 372 F.2d 836, *aff'd on rehearing en banc*, F.2d; *see also*, *Deal v. Cincinnati Board of Education*, 6 Cir., 369 F.2d 55.

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For the Fourth Circuit*

sure or entirely, they are a reflection of earlier judicial opinions. We reach our conclusion independently, for, while administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards controlling the actions of states and their subdivisions is peculiarly a judicial function.

Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination.

II

Appropriately, the School Board's plan included provisions for desegregation of the faculties. Supplemented at the direction of the District Court, those provisions are set forth in the margin.⁴

⁴ The School Board of Charles City County recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the school systems without regard to race, color or national origin. We further recognize our obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color.

In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other staff members among the various schools of this system will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools.

The following procedures will be followed to carry out the above stated policy:

1. The best person will be sought for each position without regard to race, and the Board will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties.
2. Institutions, agencies, organizations, and individuals that refer teacher applicants to the school system will be informed of the

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These the District Court found acceptable under our decision in *Wheeler v. Durham City Board of Education*, 363 F.2d 738, but retained jurisdiction to entertain applications for further relief. It acted upon a record which showed that white teachers had been assigned to the "Indian school"

above stated policy for faculty desegregation and will be asked to so inform persons seeking referrals.

3. The School Board will take affirmative steps including personal conferences with members of the present faculty to allow and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.
4. No new teacher will be hereafter employed who is not willing to accept assignment to a desegregated faculty or in a desegregated school.
5. All Workshops and in-service training programs are now and will continue to be conducted on a completely desegregated basis.
6. All members of the supervisory staff have been and will continue to be assigned to cover schools, grades, teachers and pupils without regard to race, color or national origin.
7. It is recognized that it is more desirous, where possible, to have more than one teacher of the minority race (white or Negro) on a desegregated faculty.
8. All staff meetings and committee meetings that are called to plan, choose materials, and to improve the total educational process of the division are now and will continue to be conducted on a completely desegregated basis.
9. All custodial help, cafeteria workers, maintenance workers, bus mechanics and the like will continue to be employed without regard to race, color or national origin.
10. Arrangements will be made for teachers of one race to visit and observe a classroom consisting of a teacher and pupils of another race to promote acquaintance and understanding.
11. The School Board and superintendent will exercise their best efforts, individually and collectively, to explain this program to school patrons and other citizens of Charles City County and to solicit their support of it.

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For the Fourth Circuit*

and one Negro teacher had been assigned to a formerly all white school.

The appellants' complaint is that the plan is insufficiently specific in the absence of an immediate requirement of substantial interracial assignment of all teachers.

On this record, we are unable to say what impact such an order might have upon the school system or what administrative difficulties might be encountered in complying with it. Elimination of discrimination in the employment and assignment of teachers and administrative employees can be no longer deferred,⁵ but involuntary reassignment of teachers to achieve racial blending of faculties in each school is not a present requirement on the kind of record before us. Clearly, the District Court's retention of jurisdiction was for the purpose of swift judicial appraisal of the practical consequences of the School Board's plan and of the objective criteria by which its performance of its declared purposes could be measured.

An appeal having been taken, we lack the more current information which the District Court, upon application to it, could have commanded. Without such information, an order of remand, the inevitable result of this appeal, must be less explicit than the District Court's order, with the benefit of such information, might have been.

While the District Court's approval of the plan with its retention of jurisdiction may have been quite acceptable when entered, we think any subsequent order, in light of the appellants' complaints, should incorporate some minimal, objective time table.

⁵ *Bradley v. School Bd. of Educ. of City of Richmond*, 382 U.S. 103; *Wheeler v. Durham City Bd. of Educ.*, 4 Cir., 363 F.2d 738.

Concurring Opinion of Judges Sobeloff and Winter

Quite recently, a panel of the Fifth Circuit Court of Appeals⁶ has required some progress in faculty integration for the school year 1967-68. By that decree, school boards are required to take affirmative steps to accomplish substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year and, wherever possible, to assign more than one member of the minority race to each desegregated faculty. As much should be required here. Indeed, since there was an earlier start in this case, the District Court, with the benefit of current information, should find it appropriate to fashion an order which is much more specific and more comprehensive. What is done on remand, however, must be done upon a supplemented record after an appraisal of the practical, administrative and other problems, if any, remaining to be solved and overcome.

Remanded.

SOBELOFF, Circuit Judge, with whom WINTER, Circuit Judge, joins, concurring specially.

Willingly, I join in the remand of the cases* to the District Court, for I concur in what this court orders. I disagree, however, with the limited scope of the remand, for I think that the District Court should be directed not only to incorporate an objective timetable in the School Boards' plans for faculty desegregation, but also to set up proce-

⁶ United States v. Jefferson County Bd. of Educ., fn. 3, *supra*.

* This special concurrence is directed not only to Bowman v. County School Bd. of Charles City County, but also Green v. County School Bd. of New Kent County, F.2d, decided this day.

Concurring Opinion of Judges Sobeloff and Winter

dures for periodically evaluating the effectiveness of the Boards' "freedom of choice" plans in the elimination of other features of a segregated school system.

With all respect, I think that the opinion of the court is regrettably deficient in failing to spell out specific directions for the guidance of the District Court. The danger from an unspecific remand is that it may result in another round of unsatisfactory plans that will require yet another appeal and involve further loss of time. The bland discussion in the majority opinion must necessarily be pitched differently if the facts are squarely faced. As it is, the opinion omits almost entirely a factual recital. For an understanding of the stark inadequacy of the plans promulgated by the school authorities, it is necessary to explore the facts of the two cases.

New Kent County. Approximately 1,290 children attend the public schools of New Kent County. The system operated by the School Board consists of only two schools—the New Kent School, attended by all of the county's white pupils, and the Watkins School, attended by all of the county's Negro pupils.

There is no residential segregation and both races are diffused generally throughout the county. Yet eleven buses traverse the *entire* county to pick up the Negro students and carry them to the Watkins School, located in the western half of the county, and ten other buses traverse the *entire* county to pick up the white students for the New Kent School, located in the eastern half of the county. One additional bus takes the county's 18 Indian children to the "Indian" school, located in an adjoining county. Each of the county's two schools has 26 teachers and they offer identical programs of instruction.

Concurring Opinion of Judges Sobeloff and Winter

Repeated petitions from Negro parents, requesting the adoption of a plan to eliminate racial discrimination, were totally ignored. Not until some months after the present action had been instituted on March 15, 1965, did the School Board adopt its "freedom of choice" plan.¹

The above data relate to the 1964-1965 school year.² Since the Board's "freedom of choice" plan has now been in effect for two years as to grades 1, 2, 8, 9, 10, 11 and 12 and one year as to all other grades, clearly this court's remand should embrace an order requiring an evaluation of the success of the plan's operation over that time span, not only as to faculty but as to pupil integration as well. While the court does not order an inquiry in the District Court as to pupil integration, it of course does not forbid it. Since the District Judge retained the case on the docket, the matter will be open on remand to a thorough appraisal.

Charles City County. Approximately 1,800 children attend public schools in Charles City County. As in New Kent County, Negroes and whites live in the same neighborhoods and, similarly, segregated buses (Negro, Indian and white) traverse many of the same routes to pick up their respective

¹ As this circuit has elsewhere said, "Such a last minute change of heart is suspect, to say the least." *Cypress v. The Newport News General & Nonsectarian Hospital Ass'n*, F.2d, (4th Cir. Mar. 9, 1967). See also *Lankford v. Gelston*, 364 F.2d 197, 203 (4th Cir. 1966). Of course, in the present case, the District Court has noted that the plan was adopted in order to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000.d-1 (1964), and thus ensure the flow of federal funds.

² These data are culled from answers to plaintiffs' interrogatories. Neither side has furnished us or the District Court with more recent data. In oral argument, the defendant replied obscurely and unspecifically to inquiries from the bench as to what progress the county had made.

Concurring Opinion of Judges Sobeloff and Winter

charges.³ The Board operates four schools in all—Ruthville, a combined elementary and high school exclusively for Negroes; Barnettts, a Negro elementary school; Charles City, a combined elementary and high school for whites; and Samaria, a combined elementary and high school for Indian children. Thus, as plaintiffs point out, the Board, well into the second decade after the 1954 *Brown* decision, still maintains “what is in effect three distinct school systems—each organized along racial lines—with hardly enough pupils for one system!”⁴ The District Court found that “the Negro elementary schools serve geographical areas. The other schools serve the entire county.”⁵ This contrasting treatment of the races plainly exposes the prevailing discrimination. For the 1964-65 school year, only eight Negro children were assigned to grades 4, 6, 7, 8, 9, 10 and 11 at the all-white Charles City School—an instance of the feeblest and most inconsequential tokenism.

Again, as in New Kent County, Negro parents on several occasions fruitlessly petitioned the School Board to adopt a desegregation plan. This suit was instituted on March 15,

³ The Eighth Circuit has recently held that the operation of two school buses, one for Negro children and one for white, along the same route, is impermissible. “While we have no authority to strike down transportation systems because they are costly and inefficient, we must strike them down if their operation serves to discourage the desegregation of the school systems.” *Kelley v. Arkansas Public School District*, 35 U.S.L. WEEK 2619 (8th Cir. Apr. 12, 1967).

⁴ The Board seems to go to an extreme of inefficiency and expense in order to maintain the segregated character of its schools, indulging in the luxury of three separate high school departments to serve a total of approximately 600 pupils, 437 of whom are in one school, and three separate and overlapping bus services.

⁵ F.Supp., (1966).

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1965 and the Board adopted the plan presently under consideration on August 6, 1965. Not until June 1966 did the Board assign a single Negro teacher to the all-white faculty at Charles City School. Apart from this faint gesture, however, the faculties of the Negro and white schools remain totally segregated.⁶

The majority opinion implies that this court has gone as far as the Fifth Circuit and that the "freedom of choice" plan which that circuit has directed its district courts to prescribe "embodies standards no more exacting than those we have imposed and sanctioned." If this court is willing to go as far as the Fifth Circuit has gone, I welcome the resolve.⁷ It may be profitable, therefore, to examine closely what the Court of Appeals of that jurisdiction has recently said and done.⁸ We may then see how much further our court needs to go to bring itself abreast of the Fifth Circuit.

⁶ Three of the Board's eight teachers in the 175 pupil "Indian" school are white, the other five are Indian.

The Board asserts that it is "earnestly" seeking white teachers for the nine existing vacancies in the Negro schools, but so far its efforts have not met with success. This is not surprising, considering that the Board has formally declared that it "does not propose to advertise vacancies in papers as this would likely cause people of both races to apply who are not qualified to teach."

⁷ A recent article in the Virginia Law Review declares the Fifth Circuit to be "at once the most prolific and the most progressive court in the nation on the subject of school desegregation." Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 73 (1967).

⁸ *United States v. Jefferson County Bd. of Educ.*, F.2d (5th Cir. 1966), *aff'd on rehearing en banc*, F.2d (5th Cir., Mar. 29, 1967).

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I. Pupils

Under the plans of both Charles City County and New Kent County, only children entering grades one or eight are *required* to express a choice. Freedom of choice is *permitted* children in all other grades, and "any pupil in grades other than grades 1 and 8 for whom a choice of school is not obtained *will be assigned to the school he is now attending.*"

In sharp contrast, the Fifth Circuit has expressly abolished "permissive" freedom of choice and ordered *mandatory* annual free choice for *all* grades, and "any student who has not exercised his choice of school within a week after school opens *shall be assigned to the school nearest his home . . .*"⁹ This is all that plaintiffs have been vainly seeking in New Kent County—that students be assigned to the schools nearest their homes.

If, in our cases, those who failed to exercise a choice were to be assigned to the schools nearest their homes, as the Fifth Circuit plan provides, instead of to the schools they previously attended, as directed in the plans before us, there would be a measure of progress in overcoming discrimination. As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins

⁹ *United States v. Jefferson County Bd. of Educ.*, F.2d, (5th Cir., Mar. 29, 1967) (en banc). (Emphasis supplied.)

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School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient.

In Charles City County, *Negro* elementary school children are geographically zoned, while *white* elementary school children are not, despite the conceded fact that the children of both races live in all sections of the county. Surely this curious arrangement is continued to prop up and preserve the dual school system proscribed by the Constitution and interdicted by the Fifth Circuit . . .

"The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an *integrated, unitary* school system in which there are no Negro schools and no white schools—just schools.

* * * In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the *dual school system* in this circuit requires integration of faculties, facilities, and activities, as well as students." ¹⁰

The Fifth Circuit stresses that the goal is "a unitary, non-racial system" and the question is whether a free choice plan will materially further the attainment of this goal.

¹⁰ F.2d at (en banc). (Emphasis supplied.)

Concurring Opinion of Judges Sobeloff and Winter

Stating that courts must continually check the sufficiency of school boards' progress toward the goal, the Fifth Circuit decree requires school authorities to report regularly to the district courts to enable them to evaluate compliance "by measuring the performance." In fashioning its decree, that circuit gave great weight to the percentages referred to in the HEW Guidelines,¹¹ declaring that they establish "minimum" standards

"for measuring the effectiveness of freedom of choice as a useful tool. . . . If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; *they should try other tools.*"¹²

¹¹ "[S]trong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities. [Footnote omitted.] But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court."

United States v. Jefferson County Bd. of Educ., F.2d, (5th Cir., Dec. 29, 1966), *adopted en banc*, F.2d (5th Cir., Mar. 29, 1967). Cf. Cypress v. Newport News Gen. Hosp., F.2d, n.15 (4th Cir., Mar. 9, 1967).

¹² F.2d (Emphasis supplied.) The HEW Guidelines provide: (1) if 8 or 9 percent of the Negro students in a school district transferred from segregated schools during the first year of the plan, the total transfers the following year must be on the order of at least *twice* that percentage; (2) if only 4 or 5 percent transferred, a "substantial" increase in the transfers will be expected the following year—bringing the

Concurring Opinion of Judges Sobeloff and Winter

"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects.¹³ If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a "unitary, non-racial system."

While I would prefer it if this court were more explicit in establishing requirements for periodic reporting by the school officials, I assume that the District Court will do this, rather than place the burden upon the plaintiffs to collect the essential data to show whether the free choice

total to at least *triple* the percentage of the previous year; (3) if less than 4 percent transferred the previous year, then the rate of increase in total transfers for the following year must be proportionately greater than that under (2); and (4) if no students transferred under a free choice plan, then unless a very "substantial start" is made in the following year, the school authorities will "be required to adopt a different type of plan." HEW Reg. A., 45 C.F.R. § 181.54 (Supp. 1966).

In both New Kent County and Charles City County, at least some grades have operated under a "freedom of choice" plan for two years. In Charles City County, only 0.6% of the Negro students transferred to the white school for the 1964-65 session. Under the standards subscribed to by the Fifth Circuit, therefore, a minimum of 6% of the Negro pupils in that county should have transferred to the "white" school the following year. Less than this percentage would indicate that the free choice plan was "ineffective, longer on promises than performance," and that the school officials "should try other tools"—*e.g.*, geographic zoning or pairing of grades.

In New Kent County, no Negro students transferred during the first year of the plan. Thus, unless the requisite "substantial start" was made the following year, school officials *must* adopt a different plan—one that will work.

¹³ Judge Wisdom, in *Singleton v. Jackson Munic. Separate School Dist.*, 355 F.2d 865, 871 (5th Cir. 1966), referred to "freedom of choice" plans as a "haphazard basis" for the administration of schools.

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plan is materially furthering the achievement of "a unitary, non-racial system."¹⁴

A significant aspect of the Fifth Circuit's recent decree that, by implication, this court has adopted, deserves explicit recognition. The *Jefferson County* decree orders school officials, "without delay," to take appropriate measures for the protection of Negro students who exercise a choice from "harassment, intimidation, threats, hostile words or acts, and similar behavior." Counsel for the school boards assured us in oral argument that relations between the races are good in these counties, and that no incidents would occur. Nevertheless, the fear of incidents may well intimidate Negroes who might otherwise elect to attend a "white" school.¹⁵ To minimize this fear school

¹⁴ See Section IX of the decree issued in *United States v. Jefferson County Bd. of Educ.*, F.2d, (5th Cir. Mar. 29, 1967) (en banc) providing for detailed reports to the district courts.

¹⁵ Various factors, some subtle and some not so subtle, operate effectively to maintain the status quo and keep Negro children in "their" schools. Some of these factors are listed in the recent report issued by the U.S. Commission on Civil Rights:

"Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro com-

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officials must demonstrate unequivocally that protection will be provided. It is the duty of the school boards actively to oversee the process, to publicize its policy in all segments of the population and to enlist the cooperation of police and other community agencies.¹⁶

The plaintiffs vigorously assert that the adoption of the Board's free choice plan in Charles City County, without further action toward equalization of facilities, will not cure present gross inequities characterizing the dual school system. A glaring example is the assignment of 135 commercial students to one teacher in the Negro school in contrast to the assignment of 45 commercial students per teacher in the white school and 36 in the Indian school. In the *Jefferson County* decree, the Fifth Circuit directs its attention to such matters and explicitly orders school officials to take "prompt steps" to correct such inequalities. School authorities, who hold responsibility for administration, are not allowed to sit back complacently and expect unorganized pupils or parents to effect a cure for these shockingly discriminatory conditions. The decree provides:

"Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the

munity has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation."

U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES—1965-66, at 51 (1966). In addition to the above enumeration, a report of the Office of Education has pointed out that Negro children in the high school grades refrain from choosing to transfer because of reluctance to assume additional risks close to graduation. Coleman & Campbell, *Equality of Educational Opportunity* (U.S. Office of Education, 1966). See also *Hearings Before the Special Subcommittee on Civil Rights of the House Committee on the Judiciary*, 89th Cong., 2d Sess., ser. 23 (1966).

¹⁶ HEW Reg. A, 45 C.F.R. § 181.17(c) (Supp. 1966).

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extent feasible, be *distributed evenly* between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, * * * such school shall be *closed* as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice."¹⁷

II. Faculty

Defendants unabashedly argue that they cannot be compelled to take any affirmative action in reassigning teachers, despite the fact that teachers are hired to teach in the *system*, not in a particular school. They assert categorically that "they are not required under the Constitution to desegregate the faculty." This is in the teeth of *Bradley v. School Bd. of Richmond*, 382 U.S. 103 (1965).

Having made this declaration, they say that they have nevertheless submitted a plan which does provide for faculty desegregation, but circumspectly they add that "it will require time and patience." They protest that they have done all that could possibly be demanded of them by providing a plan which would permit "a constructive beginning." This argument lacks appeal an eighth of a century after *Brown*.¹⁸ Children too young for the first grade at

¹⁷ F.2d at (en banc). (Emphasis supplied.)

¹⁸ "The rule has become: the later the start the shorter the time allowed for transition." *Lockett v. Bd. of Educ. of Muscogee County*, 342 F.2d 225, 228 (5th Cir. 1965). See *Rogers v. Paul*, 382 U.S. 198, 199 (1965); *Bradley v. School Bd. of Richmond*, 382 U.S. 103 (1965); *Griffin v. County School Bd.*, 377 U.S. 218, 229 (1964); *Watson v. City of Memphis*, 373 U.S. 526, 530 (1963).

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the time of that decision are beyond high school age by now. Yet their entire school experience, like that of their elder brothers and sisters, parents and grandparents, has been one of total segregation. They have attended only a "Negro" school with an all Negro staff and an all Negro student body. If their studies encompassed *Brown v. Bd. of Educ.* they must surely have concluded sadly that "the law of the land" is singularly ineffective as to them.

The plans of both counties grandly profess that the pattern of staff assignment "will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools." No specific steps are set out, however, by which the boards mean to integrate faculties. It cannot escape notice that the plans provide only for assignments of "new personnel in a manner that will *work towards* the desegregation of faculties." As for teachers presently employed by the systems, they will be "allowed" (in Charles City County, the plan reads "allowed and encouraged") to accept transfers to schools in which the majority of the faculty members are of the opposite race. We are told that heretofore an average of only 2.6 new white teachers have been employed annually in New Kent County. Thus the plan would lead to desegregation only by slow attrition. There is no excuse for thus protracting the corrective process. School authorities may not abdicate their plain duty in this fashion. The plans filed in these cases leave it to the *teachers*, rather than the Board, to "disestablish dual, racially segregated school systems" and to establish "a unitary, non-racial system." This the law does not permit.

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As the Fifth Circuit has put it, "school authorities have an *affirmative duty* to break up the historical pattern of segregated faculties, the hallmark of the dual system."¹⁹

"[U]ntil school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system."²⁰

In contrast to the frail and irresolute plans submitted by the appellees, the Fifth Circuit has ordered school officials within its jurisdiction not only to make *initial* assignments on a non-discriminatory basis, but also to *reassign* staff members "to eliminate *past* discriminatory patterns."

For this reason, I wholeheartedly endorse the majority's remand for the inclusion of an *objective* timetable to facilitate evaluation of the progress of school authorities in desegregating their faculties. I also join the majority in calling upon the District Court to fashion a specific and comprehensive order requiring the boards to take firm steps to achieve *substantial* desegregation of the faculties. At this late date a desegregation plan containing only an indefinite pious statement of future good intentions does not merit judicial approval.

¹⁹ F.2d at

²⁰ *United States v. Jefferson County Bd. of Educ.*, F.2d, (5th Cir. 1966), *adopted en banc*, F.2d (5th Cir. Mar. 29, 1967). This thought has been similarly expressed in *Bradley v. School Bd. of City of Richmond*, 345 F.2d 310, 323 (4th Cir. 1965) (concurring opinion):

"It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with their nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated." (Emphasis in the original.)

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I must disagree with the prevailing opinion, however, where it states that the record is insufficiently developed to order the school systems to take further steps at this stage. No legally acceptable justification appears, or is even faintly intimated, for not immediately integrating the faculties. The court underestimates the clarity and force of the facts in the present record, particularly with respect to New Kent County, where there are only two schools, with identical programs of instruction, and each with a staff of 26 teachers. The situation presented in the records before us is so patently wrong that it cries out for immediate remedial action, not an inquest to discover what is obvious and undisputed.

It is time for this circuit to speak plainly to its district courts and tell them to require the school boards to get on with their task—no longer avoidable or deferrable—to integrate their faculties. In *Kier v. County School Bd. of Augusta County*, 249 F. Supp. 239, 247 (W.D. Va. 1966), Judge Michie, in ordering complete desegregation by the following years of the staffs of the schools in question, required that “the percentage of Negro teachers in each school in the system should approximate the percentage of the Negro teachers in the entire system” for the previous year. See *Dowell v. School Bd.*, 244 F. Supp. 971, 977-78 (W.D. Okla. 1965), *aff’d*, 35 U.S.L. WEEK 2484 (10th Cir., Jan. 23, 1967), *cert. denied*, 35 U.S.L. WEEK 3418 (U.S. May 29, 1967). While this may not be the precise formula appropriate for the present cases, it does indicate the attitude that district courts may be expected to take if this court speaks with clarity and firmness.

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III. *The Briggs v. Elliott Dictum*

The defendants persist in their view that it is constitutionally permissible for *parents* to make a choice and assign their children; that courts have no role to play where segregation is not actively *enforced*. They say that *Brown* only proscribes enforced segregation, and does not command action to undo existing consequences of earlier enforced segregation, repeating the facile formula of *Briggs v. Elliott*.²¹

The court's opinion recognizes that "it is the duty of the school boards to eliminate the discrimination which inheres" in a system of segregated schools where the "initial assignments are both involuntary and dictated by racial criteria," but seems to think the system under consideration today "a very different thing." I fail to perceive any basis for a distinction. Certainly the two counties with which we are here concerned, like the rest of Virginia, historically had *de jure* segregation of public education, so that by the court's own definition, the boards are under a duty "to eliminate the discrimination which inheres" in such a system. Whether or not the schools now permit "freedom of choice," the segregated conditions initially created *by law* are still perpetuated by relying primarily on Negro pupils "to extricate themselves from the segregation which has long been firmly established and resolutely maintained" ²² "[T]hose who operate the schools formerly segre-

²¹ "Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination." 132 F. Supp. 776, 777 (E.D.S.C. 1955).

²² *Bradley v. School Bd. of City of Richmond*, 345 F.2d 310, 322 (4th Cir. 1965) (concurring opinion).

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gated by law, and not those who attend, are responsible for school desegregation."²³

It is worth recalling the circumstances that gave birth to the *Briggs v. Elliott* dictum—it is no more that dictum. A three-judge district court over which Judge Parker presided had denied relief to South Carolina Negro pupils and when this decision came before the Supreme Court as part of the group of cases reviewed in *Brown v. Bd. of Educ.*, the Court overruled the three-judge court and issued its mandate to admit the complaining pupils to public schools "on a racially non-discriminatory basis with all deliberate speed." Reassembling the three-judge panel, Judge Parker understook to put his gloss upon the Supreme Court's decision and coined the famous saying.²⁴ This catchy apothegm immediately became the refuge of defenders of the segregation system, and it has been quoted uncritically to eviscerate the Supreme Court's mandate.²⁵

²³ Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 45 (1967).

See *Dowell v. School Bd.*, 244 F. Supp. 971, 975, 981 (W.D. Okla. 1965), *aff'd*, 35 U.S.L. WEEK 2484 (10th Cir. Jan. 23, 1967), *cert. denied*, 35 U.S.L. WEEK 3418 (U.S. May 29, 1967):

"The Board maintains that it has no affirmative duty to adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. But a school system does not remain static, and the failure to adopt an affirmative policy is itself a policy, adherence to which, at least in this case, has slowed up—in some cases—reversed the desegregation process.

The duty to disestablish segregation is clear in situations such as Oklahoma City, where such school segregation policies were in force and their effects have not been corrected." (Emphasis supplied.)

²⁴ See n.21, *supra*.

²⁵ Judge Wisdom, in the course of a penetrating criticism of the *Briggs* decision, says:

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Having a deep respect for Judge Parker's capacity to discern the lessons of experience and his high fidelity to duty and judicial discipline, it is unnecessary for me to speculate how long he would have adhered to his view, or when he would have abandoned the dictum as unworkable and inherently contradictory.²⁶ In any event, the dictum cannot withstand the authority of the Supreme Court or survive its exposition of the spirit of the *Brown* holding, as elaborated in *Bradley v. School Bd.*, 382 U.S. 103 (1965); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963); *Cooper v. Aaron*, 358 U.S. 1 (1958).

"Briggs overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools or a school system with uncorrected effects of segregation."

Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and the organized undoing of the effects of past segregation.

The central vice in a formerly de jure segregated public school system is apartheid by dual zoning * * *. Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes. * * * [T]he overriding right of Negroes as a class [is] to a completely integrated public education."

F.2d at, (Emphasis supplied.)

²⁶ Shortly after pronouncing his dictum, in another school case Judge Parker nevertheless recognized that children cannot enroll themselves and that the duty of enrolling them and operating schools in accordance with law rests upon the officials and cannot be shifted to the pupils or their parents. *Carson v. Warlick*, 238 F.2d 724, 728 (1956).

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Anything that some courts may have said in discussing the obligation of school officials to overcome the effects of *de facto* residential segregation, caused by private acts and not imposed by law, is certainly not applicable here. Ours is the only circuit dealing with school segregation resulting from past legal compulsion that still adheres to the *Briggs* dictum.

"The Fourth is apparently the only circuit of the three that continues to cling to the doctrine of *Briggs v. Elliott* and embraces freedom of choice as a final answer to school desegregation in the absence of intimidation and harrassment."²⁷

We should move out from under the incubus of the *Briggs v. Elliott* dictum and take our stand beside the Fifth and the Eighth Circuits.

²⁷ Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 72 (1967). See *United States v. Jefferson County Bd. of Educ.*, _____ F.2d _____ (5th Cir., Mar. 29, 1967) (en banc); *Singleton v. Jackson Munic. Separate School Dist.*, 348 F.2d 729, 730 n.5 (5th Cir. 1965) ("[T]he second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well known dictum . . . in *Briggs v. Elliott* . . . should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights."); *Kemp v. Beasley*, 352 F.2d 14, 21 (8th Cir. 1965) ("The dictum in *Briggs* has not been followed or adopted by this Circuit and it is logically inconsistent with Brown and subsequent decisional law on this subject.")

Cf. Evans v. Ennis, 281 F.2d 385, 389 (3d Cir. 1960), cert. denied, 364 U.S. 933 (1961): "The Supreme Court has unqualifiedly declared integration to be their constitutional right." (Emphasis supplied.)

**Judgment of United States Court of Appeals
For the Fourth Circuit**

No. 10,792

Charles C. Green, Carroll A. Green and Robert C. Green,
infants, by Calvin C. Green and Mary O. Green,
their father and mother and next friends,
and all others of the plaintiffs,
Appellants,

versus

County School Board of New Kent County, Virginia, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond, for further proceedings consistent with the opinion of the Court filed herein; and that each side bear its own costs on appeal.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

Filed: June 12, 1967
Maurice S. Dean, Clerk

**Order Extending Time to File Petition for
Writ of Certiorari**

SUPREME COURT OF THE UNITED STATES

No., OCTOBER TERM, 1967

SHIRLETTE L. BOWMAN, CHARLES C. GREEN, *et al.*,
Petitioners,

—VS.—

COUNTY SCHOOL BOARDS OF CHARLES CITY COUNTY, VIRGINIA,
and NEW KENT COUNTY, VIRGINIA, *et al.*

UPON CONSIDERATION of the application of counsel for
petitioner(s),

IT IS ORDERED that the time for filing a petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including October 10, 1967.

/s/ HUGO L. BLACK
*Associate Justice of the Supreme
Court of the United States*

Dated this 8th day of September, 1967

Order Allowing Certiorari—December 11, 1967

SUPREME COURT OF THE UNITED STATES

No. 695, OCTOBER TERM, 1967

CHARLES C. GREEN, *et al.*,

Petitioners,

—VS.—

COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA; *et al.*,

Respondents.

The petition herein for a writ of certiorari to the United States Supreme Court of Appeals for the Fourth Circuit is granted and the case is placed on the Summary Calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED

OCT. 9 1967

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1967

No. **695**

CHARLES C. GREEN, et al.,

Petitioners,

—v.—

**COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA, et al.,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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IN THE
Supreme Court of the United States

October Term, 1967

No.

CHARLES C. GREEN, *et al.*,

Petitioners,

—v.—

COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA, *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on June 12, 1967.

Citations to Opinions Below

The District Court filed memorandum opinions on May 17, 1966 and on June 28, 1966. Both are unreported but are reprinted in the appendix at pp. 1-15a. The June 12, 1967 opinion of the Court of Appeals, reprinted in the appendix at p. 16a, is reported at — F.2d —.

Jurisdiction

The judgment of the Court of Appeals was entered June 12, 1967, appendix p. 41a, *infra*. Mr. Justice Black, on September 8, 1967, extended the time for filing the petition for certiorari until October 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Whether—13 years after *Brown v. Board of Education*—a school board adequately discharges its obligation to effect a unitary non-racial school system, by adopting a freedom of choice desegregation plan, where the evidence shows that such plan is not likely to disestablish the dual system and where there are other methods, no more difficult to administer, which would immediately produce substantial desegregation.

Statutes and Constitutional Provisions Involved

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

Statement

Petitioners seek review of the adequacy of a freedom of choice desegregation plan adopted by defendant School Board and approved by the Court below *en banc*, Judges Sobeloff and Winter disagreeing with the majority opinion.

I. The Pleadings and Evidence

Petitioners, Negro parents and children of New Kent County, Virginia, filed on March 15, 1965, in the United States District Court for the Eastern District of Virginia, a class action seeking injunctive relief against the maintenance of separate schools for the races. The complaint named as defendants the County School Board, its individual members, and the Superintendent of Schools.¹

To comply with Title VI of the Civil Rights Act of 1964, 78 Stat. 241, and regulations of the United States Department of Health, Education and Welfare, the New Kent County School Board, on August 2, 1965, adopted a freedom of choice desegregation plan and on May 10, 1966 filed copies thereof with the District Court.

New Kent is a rural county in Eastern Virginia, east of the City of Richmond. There is no residential segregation; both races are diffused generally throughout the

¹ The action was filed pursuant to 28 U.S.C. § 1331 and § 1343, and 42 U.S.C. § 1981 and § 1983. The complaint alleged that (R. Vol. 2, p. 8):

Notwithstanding the holding and admonitions in *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), the defendant school board maintains and operates a biracial school system. . . .

[that the defendants] ha[d] not devoted efforts toward initiating non-segregation in the public school system, [and had failed to make] a reasonable start to effectuate a transition to a racially non-discriminatory school system as under paramount law it [was] their duty to do.

The defendants filed, on April 5, 1965, a Motion to Dismiss the complaint on the sole ground that it failed to state a claim upon which relief could be granted (R. Vol. 2, p. 13). In an order entered on May 5, 1965, the district court deferred ruling on the motion and directed the defendants to file an answer by June 1, 1965 (R. Vol. 2, p. 15).

county.³ (cf. PX "A" and "B"; see also the opinion of Judge Sobeloff at p. 23a.)³

*Students:*⁴ During the 1964-1965 school year some 1291 students (approximately 739 Negroes, 552 whites) were enrolled in the only two schools maintained by the county: New Kent School, a combined all-white elementary and high school and George W. Watkins School, a combined all-Negro elementary and high school. There were no attendance zones. Each school served the entire county. During 1964-65, 11 Negro busses canvassed the entire county to deliver 710 of the 740 Negro pupils to Watkins, located in the western half of the county. Ten busses transported almost all of the 550 white pupils to New Kent in the eastern half. (See PX "A" and "B" and the answer to question No. 4).

There was no pupil desegregation whatever during the 1964-65 school year. Every Negro pupil attended Watkins and every white pupil attended New Kent. Eighteen Indian pupils living in New Kent were bussed to the Indian school in adjoining Charles City County.

From 1956 through the 1965-66 school year school assignments of New Kent pupils were governed by the Virginia Pupil Placement Act §22.232.1 *et seq.* Code of Vir-

³ The Census reports show that the Negro population was substantially the same in each of the four magisterial districts in New Kent County: Black Creek-479, Cumberland-637, St. Peters-633, and Weir Creek-565. See U.S. Bureau of the Census. *U.S. Census of Population: 1960 General Population Characteristics, Virginia*. Final Report PC(1)-48B.

³ The prefix "PX" refers to plaintiffs' exhibits. Exhibits "A" and "B" show the bus routes for each of the two county schools. Each exhibit shows the routes travelled by the various busses bringing children to that particular school. Each school is served by busses that traverse all areas of the county.

⁴ The information that follows was obtained from defendants' answers to plaintiffs interrogatories (R. Vol. 2, pp. 27-36).

ginia, 1950 (1964 Replacement Volume), repealed by Acts of Assembly, 1966, c. 590, under which any pupil could request assignment to any school in the county; children making no request were assigned to the school previously maintained for their race. The free choice plan the Board adopted in August, 1965 was not placed into effect until the 1966-67 school year by which time it had been approved by the district court.

Up to and including the 1964-65 school year, no Negro pupil ever sought admission to New Kent School and no white pupil ever sought admission to Watkins (R. Vol. 2, p. 28). Thus, at the close of the 1964-65 school year, 11 years after *Brown v. Board of Education*, 347 U.S. 483, none of the 739 Negro pupils in the county were in, or had ever attended, school with white students.

As the following table⁵ indicates, the Negro school was more overcrowded and had a substantially higher pupil-teacher ratio, and larger class sizes than the white school:

Name of School	Pupil-Teacher Ratio	Average Class Size	Overcrowding Variance from Capacity (Elem. Schools)	Number Buses	Average Pupils Per Bus
New Kent (white) 1-12	22	21	+ 37 (9%)	10	54.8
George W. Watkins (Negro) 1-12	28	26	+118 (28%)	11	64.5

In the 1965-66 school year some 35 Negroes attended the formerly white New Kent High School but no white students attended Watkins. During the year just ended, 1966-1967, 111 of the 739 Negroes in the County attended New Kent.

⁵ This table was compiled from defendants' answers to plaintiffs' interrogatories relative to the 1964-65 school year (R. Vol. 2, pp. 27-36).

No white students attended Watkins; all 628 pupils at Watkins were Negroes. Thus, as late as 13 years after the decision in *Brown*, 85% of the Negro students in the County attended school only with other Negroes.⁶

Faculty: Contracts with teachers are executed for a period of one year. No white teachers were assigned to the all-Negro Watkins School during 1964-65 nor Negro teachers to the all-white New Kent School, and none had ever been so assigned. The policy remained unchanged for 1965-66. During 1966-67 the extent of teacher desegregation was the assignment of a single Negro teacher two days each week to New Kent.

II. *The Plan Adopted by the Board*

As indicated above, the New Kent School Board on August 2, 1965, adopted a freedom of choice desegregation plan to be placed into effect in the 1966-67 school year.⁷ The plan provides essentially for "permissive transfers" for 10 of the 12 grades. Only students eligible to enter grades one and eight are required to exercise a choice of schools. It provides further that "any student in grades other than grades one and eight for whom a choice is not obtained will be assigned to the school he is now attending."⁸

⁶ The record in this case, like the records in all school desegregation cases, is necessarily stale by the time it reaches this Court. In this case the 1964-65 school year was the last year for which the record supplied desegregation statistics. Information regarding student and faculty desegregation during the 1965-66 and 1966-67 school years was obtained from official documents, available for public inspection, maintained by the United States Department of Health, Education and Welfare. Certified copies thereof and an accompanying affidavit have been filed with this Court and served upon opposing counsel.

⁷ The plan was included by the district court in its memorandum opinion of June 28, 1966, reproduced herein at p. 4a.

⁸ By failing to require, at least in its initial year, that every student make a choice, the plan permits some students to be assigned under the former dual assignment system until approximately 1973. Under the plan

It states that no choice will be denied other than for overcrowding in which case students living nearest the school chosen will be given preference.

III. The District Court's Decision

On May 4, 1966, the case was tried before the District Judge, Hon. John D. Butzner, Jr., who, on May 17, 1966, entered a memorandum opinion and order: (a) denying defendants' motion to dismiss, and (b) deferring approval of the plan pending the filing by the defendants of "an amendment to the plan [which would provide] for employment and assignment of staff on a non-racial basis." (R. Vol. 2, pp. 51-56; 2a).

The Board filed on June 6, 1966, a supplement to its plan dealing with school faculties. On June 10, 1966, plaintiffs filed exceptions to the supplement contending

students entering other than grades one or eight who do not exercise a choice are assigned to the school they are then attending. Thus, a student, who began school in fall, 1965, one year before the plan went into effect and was therefore assigned to a school previously maintained for his race would, unless he affirmatively exercised a choice to go elsewhere, be reassigned there for the remainder of his elementary school years. Similarly, students who entered high school prior to 1966-67 under the old dual assignment system, would, unless they took affirmative action to transfer elsewhere, be reassigned to that school until graduation. The plan, then, permits some students (those who began at a school before it went into effect) to be reassigned for as long as up to seven years (in the case of a first grader) to schools to which they originally had been assigned on the basis of race. It need hardly be said that such a plan—one which fails immediately to abolish continued racial assignments or reassignments—may not stand under *Brown v. Board of Education*, 347 U.S. 483 and 349 U.S. 294. The Fifth Circuit has rejected plans having that effect. See *United States v. Jefferson County Board of Education*, 372 F.2d 836, 890-891, *aff'd with modifications on rehearing en banc*, No. 23345, March 29, 1967, *petition for certiorari pending*, Nos. 256, 282, 301. We point this out only in the interest of careful analysis. For overturning the decision below on this ground would be insufficient to protect petitioners' rights. As we more fully develop later what is objectionable about this plan is its employment of free choice assignment provisions to perpetuate segregation in an area where, because of the lack of residential segregation, it could not otherwise result.

(a) that the supplement failed to provide sufficiently for faculty and staff desegregation, and (b) that plaintiffs would continue to be denied constitutional rights under the freedom of choice plan and that the defendants should be required to assign students pursuant to geographic attendance areas. (R. Vol. 2, pp. 61-62).

On June 28, 1966, the district court entered a memorandum opinion and an order approving the freedom of choice plans as amended. (R. Vol. 1, pp. 7-19; 4a.)

IV. *The Court of Appeals' Opinion*

On appeal to the Court of Appeals for the Fourth Circuit petitioners contended that in view of the circumstances in the county, the freedom of choice plan adopted by the defendants was the method least likely to accomplish desegregation and that the district court erred in approving it.

On June 12, 1967, the Court, *en banc*, affirmed the district court's approval of the freedom of choice assignment provisions of the plan, but remanded the case for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal objective time table," some of the faculty provisions of the decree entered by the Fifth Circuit in *United States v. Jefferson County Board of Education*, *supra* (22a).

Judges Sobeloff and Winter concurred specially with respect to the remand on the teacher issue but disagreed on other aspects. Said Judge Sobeloff (22a):⁹

⁹ This case was decided together with a companion case *Bowman v. County School Board of Charles City County, Virginia*, No. 10793, for which no review is sought. While the opinion discussed herein was rendered in the *Charles City* case, it was expressly made applicable to *New Kent* (p. 15a); similarly Judge Sobeloff stated that his opinion in *Charles City* applied to *New Kent* (p. 22a).

I think that the District Court should be directed not only to incorporate an objective time table in the School Board's plans but also to set up procedures for periodically evaluating the effectiveness of the Board's "Freedom-of-choice" plans in the elimination of other features of a segregated school system.

... Since the Board's "Freedom-of-choice" plan has now been in effect for two years as to grades 1, 2, 8, 9, 10, 11 and 12 and one year as to all other grades, clearly this court's remand should embrace an order requiring an evaluation of the success of the plan's operation over that time span, not only as to faculty but as to pupil integration as well. (24a)

While they did not hold, as petitioners had urged, that the peculiar conditions in the county made freedom of choice constitutionally unacceptable as a tool for desegregation they recognized that it was utilized to maintain segregation (27-28a):

As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, *the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School.*

Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, *is deliberately maintaining a*

segregated system which would vanish with non-racial geographic zoning. The conditions in this county represent a classical case for this expedient. (Emphasis added.)

While the majority implied that freedom of choice was acceptable regardless of result, Judges Sobeloff and Winter stated the test thus '(30a):

'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end.

REASONS FOR GRANTING THE WRIT

I.

Introduction

This case presents an issue of paramount importance regarding the desegregation of public schools throughout the southern and border states pursuant to *Brown v. Board of Education*.¹⁰ More particularly, the question is whether in the mid-sixties, a full generation of public school children after *Brown*, school boards may continue to adopt so-called freedom of choice desegregation plans which tend to perpetuate racially identifiable schools, where there are other methods, equally if not more feasible to administer, which will more speedily disestablish the dual systems.

¹⁰ 347 U.S. 483 (*Brown I*); 349 U.S. 294 (*Brown II*).

The most marked and widespread innovation in school administration in the southern and border states in the last fifty years has been the change in pupil assignment method in the years since *Brown*,¹¹ from a geographic attendance zone system to so-called "free choice." Prior to *Brown*, systems in the North and South, with rare exception, assigned pupils by means of zone lines drawn around each school.¹²

Under an attendance zone system, unless a transfer request is granted for some special reason, students living in the zone of the school serving their grade would normally attend that school.

Prior to the relatively recent controversy concerning segregation in large urban systems, assignment by geographic attendance zones was viewed as the soundest method of pupil assignment. This was not without good reason; for placing children in the school nearest their home would often eliminate the need to furnish transportation, encourage the use of schools as community centers and generally facilitate the task of planning for an ever-expanding school population.¹³

In states where separate systems were required by law, the zone assignment method was implemented by drawing around each white school attendance zones designed to

¹¹ See generally, Campbell, Cunningham and McPhee, *The Organization and Control of American Schools*, 1965. ("As a consequence of [*Brown v. Board of Education*, *supra*], the question of attendance areas has become one of the most significant issues in american education of this Century" (at 136)).

¹² See Meador, *The Constitution and The Assignment of Pupils to Public School*, 45 Va. L. Rev. 517 (1959), "until now the matter has been handled rather routinely almost everywhere by marking off geographical attendance areas for the various buildings. In the South, however, coupled with this method has been the factor of race."

¹³ Campbell, Cunningham and McPhee, *supra*, Note 11 at 133-144.

accommodate whites in the area, and around each Negro school attendance zones for Negroes. In many areas, as in the cases before the Court, where the entire county was a zone, lines overlapped because of the lack of residential segregation. Thus, in most southern school districts, school assignment was largely a function of three factors: race, proximity and convenience.

After *Brown*, southern school boards were faced with the problem of "effectuating a transition to a racially non-discriminatory system" (*Brown II* at 301). The easiest method was to convert the dual attendance zones, drawn according to race, into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience. With rare exception, however, southern school boards, when finally forced to begin the desegregation process, rejected this relatively simple method in favor of the complex and discriminatory procedures of pupil placement laws and, when those were invalidated,¹⁴ switched to what has in practice worked the same way—the so-called free choice.¹⁵

¹⁴ The Virginia Pupil Placement Law was invalidated in *Green v. County School Board of the City of Roanoke*, 304 F.2d 118 (4th Cir., 1962) and *Marsh v. County School Board of Roanoke County, Va.*, 305 F.2d 94 (4th Cir., 1962). For other cases invalidating or disapproving similar laws, see *Northcross v. Board of Education of the City of Memphis*, 302 F.2d 818 (6th Cir., 1962); *Gibson v. Board of Public Instruction of Dade County*, 272 F.2d 763 (5th Cir., 1959); *Manning v. Board of Public Instruction of Hillsboro County*, 277 F.2d 370 (5th Cir., 1960); *Dove v. Parham*, 282 F.2d 256 (8th Cir., 1960).

¹⁵ According to the Civil Rights Commission, the vast majority of school districts in the south use freedom of choice plans. See *Southern School Desegregation, 1966-67*, A Report of the U.S. Commission on Civil Rights, July, 1967. The Report states, at pp. 71-72:

All . . . districts [desegregating under voluntary plans] in Alabama, Mississippi, and South Carolina, without exception, and 83% of such districts in Georgia have adopted free choice plans. . . .

Under a so-called free choice plan of desegregation, students are given a privilege rarely enjoyed in the past—the opportunity to attend the school of their choice. Most often they are permitted to choose any school in the system, but in some areas, they are permitted to choose only either the previously all-Negro or previously all-white school in a limited geographic area. Not only are such plans more difficult to administer (choice forms now have to be processed and standards developed for passing on them, with provision for notice of the right to choose and for dealing with students who fail to exercise a choice),¹⁶ they are, in addition, far less likely to disestablish the

The great majority of districts under court order also are employing "freedom of choice."

See also *Survey of School Desegregation in the Southern and Border States, 1965-1966*, United States Commission on Civil Rights, February, 1966, at p. 47.

¹⁶ The decree appended by the United States Court of Appeals for the Fifth Circuit, to its recent decision in *United States v. Jefferson County Board of Education*, 372 F.2d 836, *aff'd with modification on rehearing en banc*, Civil No. 23345, March 29, 1967, shows the complexity of such plans. That Court had previously described such plans as a "haphazard basis" for the administration of schools. *Singleton v. Jackson Municipal Separate School District*, 355 F.2d 865, 871 (5th Cir. 1966).

Under such plans generally, and under the plan in this case, school officials are required to mail (or deliver by way of the students) letters to the parents informing them of their rights to choose within a designated period, compile and analyze the forms returned, grant and deny choices, notify students of the action taken and assign students failing to choose to the schools nearest their homes. Virtually each step of the procedure, from the initial letter to the assignment of students failing to choose, provides an opportunity for individuals hostile to desegregation to forestall its progress, either by deliberate mis-performance or non-performance. The Civil Rights Commission has reported on non-compliance by school authorities with their desegregation plans:

In Webster County, Mississippi, school officials assigned on a racial basis about 200 white and Negro students whose freedom of choice forms had not been returned to the school office, even though the desegregation plan stated that it was mandatory for parents to exercise a choice and that assignments would be based on that choice [footnote omitted]. In McCarty, Missouri after the school board had

dual system. And, as demonstrated below, experience has proved them largely incapable of disestablishing the dual system.

Under free choice plans, the extent of actual desegregation varies directly with the number of students seeking, and actually being permitted to transfer to schools previously maintained for the other race. It should have been obvious, however, that white students—in view of general notions of Negro inferiority and the hard fact that in far too many areas Negro schools were vastly inferior to those furnished whites¹⁷—would not seek trans-

distributed freedom of choice forms and students had filled out and returned the forms, the board ignored them.

Survey of School Desegregation in the Southern and Border States, at p. 47. Given the other shortcomings of free choice plans, there is serious doubt whether the constitutional duty to effect a non-racial system is satisfied by the promulgation of rules so susceptible of manipulation by hostile school officials. As Judge Sobeloff has observed:

A procedure which might well succeed under sympathetic administration could prove woefully inadequate in an antagonistic environment.

Bradley v. School Board of the City of Richmond, 345 F.2d 310 (4th Cir. 1965) (concurring in part and dissenting in part).

¹⁷ Watkins, the Negro school in New Kent County was more overcrowded and had substantially larger class sizes and teacher-pupil ratios than did the white school. (See p. 5, *supra*).

The Negro schools in the South compare unfavorably to white schools in other important respects. In *Equality of Educational Opportunity*, a report prepared by the Office of Education of the United States Department of Health Education and Welfare pursuant to the Civil Rights Act of 1964, the Commissioner states, concerning Negro schools in the Metropolitan South (at p. 206):

The average white attends a secondary school that, compared to the average Negro is more likely to have a gymnasium, a foreign language laboratory with sound equipment, a cafeteria, a physics laboratory, a room used only for typing instruction, an athletic field, a chemistry laboratory, a biology laboratory, at least three movie projectors.

Essentially the same was said of Negro schools in the non-metropolitan South (*Id.* at 210-211). It is not surprising, therefore, quite apart from race, that white students have unanimously refrained from choosing Negro schools.

fers to the formerly Negro schools; and, indeed, very few ever have.¹⁸ Thus, from the very beginning the burden of disestablishing the dual system under free choice plans was thrust squarely upon the Negro children and their parents, despite the admonition of this Court in *Brown II* (349 U.S. 294, 299) that "school authorities had the primary responsibility." That is what happened in this case. Although the majority stated that (17a):

The burden of extracting individual pupils from discriminatory racial assignment may not be cast upon the pupils and their parents [and that] it is the duty of the school boards to eliminate the discrimination which inheres in such a system [.]

the very plan the court approved did just that. To be sure each pupil was given the unrestricted right to attend any school in the system. But, as previously noticed, desegregation never occurs except by transfers by Negroes to the white schools. Thus, the freedom of choice plan approved below, like all other such plans, placed the burden of achieving a single system upon Negro citizens.¹⁹

¹⁸ "During the past school year, as in previous years, white students rarely chose to attend Negro schools." *Southern School Desegregation, 1966-67* at p. 142, *United States v. Jefferson County*, *supra* at 889.

¹⁹ The free choice plan adopted in this case is subject to serious question on the ground that it promotes invidious discrimination. By permitting students to choose a school, instead of assigning them on some rational non-racial basis, the school board allows students to utilize race as a factor in the school selection process. Thus it is that white students, almost invariably, choose the formerly white schools and not the Negro schools. To be sure the Constitution does not prohibit private discrimination. But states may not designedly facilitate the discriminatory conduct of individuals or lend support to that end. See *Reitman v. Mulkey*, 18 L. Ed. 831; *Robinson v. Florida*, 378 U.S. 153; *Anderson v. Martin*, 375 U.S. 399; *Hoss v. Board of Education*, 373 U.S. 683. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715. Thus in *Anderson*, this Court held that although individual voters are constitutionally free to vote partly or even solely on the basis of race, the State may not designate the race of candidates on the ballot. Such governmental action promotes and facilitates

The fundamental premise of *Brown I* was that segregation in public education had very deep and long term effects upon the Negroes set apart. It was not surprising, therefore, that individuals, reared in that system and schooled in the ways of subservience (by segregation, not only in schools, but in every other conceivable aspect of human existence) when gratuitously asked to "make a choice," chose, by their inaction, that their children should remain in the Negro schools. In its *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964* (hereinafter referred to as *Revised Guidelines*), the Department of Health, Education and Welfare states (45 C.F.R. Part 181.54):

A free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, *the very nature of a free choice plan and the*

the voters' succumbing to racial prejudice. So too here, giving students in a district formerly segregated by law the right to choose a school facilitates and promotes choices based on race.

It is no answer that some students may not, in fact, use race as a factor in the choice process. In *Anderson*, the statute was not saved because some persons might vote without regard to the race of the candidate. It is the furnishing of the opportunity that is prohibited by the Constitution.

We do not argue that a school board may never permit students to choose schools. And certainly systems using attendance zones would not run afoul of the Constitution by permitting students to transfer for good cause shown. Presumably in such instances a legitimate non-racial reason would have to be supplied.

Nor do we argue that freedom of choice may never be used where race is intended to be a factor. For in a system in which residential segregation is deeply entrenched, the allowance of a choice of schools based on race may be a useful way to achieve desegregation. There, however, the plan is being used to *undo* rather than *perpetuate* segregation as the plan in this case is being used to do. Cf. *Goss, supra* at 688, where this Court stated that "no plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."

effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students. (Emphasis added.)

Beyond that, by making the Negro's exercise of choice the critical factor upon which the conversion depended, school authorities virtually inspired its failure. Every community pressure militates against the affirmative choice by Negro parents of white schools. Moreover, intimidation of Negroes, a weapon well-known throughout the south, could equally be employed to deter them from seeking transfers to the white school. At best, school officials must have reasoned, only a few hardy souls would venture from the more comfortable atmosphere of the Negro school, with their all-Negro faculties and staff. Those that "dared," would soon be taught their place.²⁰

Not were they mistaken. The Civil Rights Commission, in its most recent reports on school desegregation in *Brown*-affected states, reports exhaustively of the violence, threats of violence and economic reprisals to which Negroes have been and are subjected to deter them from

²⁰ A good example is *Coppedge v. Franklin County Board of Education*, C.A. No. 1796 (E.D. No. Car.), decided August 17, 1967. The Court found that there was marked hostility to desegregation in Franklin County, that Negroes had been subjected to violence, intimidation and reprisals, and that each successive year under the freedom of choice plan it had approved earlier had resulted in fewer requests by Negroes for reassignment to formerly all-white schools. Concluding that (slip op. 15):

Community attitudes and pressures . . . have effectively inhibited the exercise of free choice of schools by Negro pupils and their parents

the Court directed that the defendants

prepare and submit to the Court, on or before October, 1967, a plan for the assignment, at the earliest practicable date, of all students upon the basis of a unitary system of non-racial geographic attendance zones, or a plan for the consolidation of grades, or schools, or both. (*Id.* at 17.)

placing their children in white schools.²¹ That specific episodes do not occur to particular individuals hardly prevents them from learning of them and acting on that knowledge.

With rare exception, then, school officials adapted, and the lower courts condoned, free choice knowing full well that it would produce less Negro students in white schools, and less injury to white sensibilities than under the geo-

²¹ *Southern School Desegregation, 1966-67* at pp. 70-113; *Survey of School Desegregation in the Southern and Border States, 1965-66*, at pp. 55-66. To relate but a few of the numerous instances of intimidation upon which the Commission reported: the 1966-67 study quotes the parents of 12 year old boy in Clay County, Mississippi as saying (at p. 76):

white folks told some colored to tell us that if the child went [to a white school] he wouldn't come back alive or wouldn't come back like he went.

In Edgecombe County, North Carolina the home of a Negro couple whose son and daughter were attending the formerly all-white school was struck by gunfire (79). In Dooly County, Georgia, the father of a 14 year old boy, who had filled out his own form and attended the formerly white school, reported that "that Monday night the man [owner] came and said 'I want my damn house by Saturday.'" (83)

The Commission made the following findings, in its 1966-67 report, (at p. 142):

6. Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and Border States, require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:

- (a) Fear of retaliation and hostility from the white community . . .
- (b) [V]iolence, threats of violence and economic reprisal by white persons, [and the] harassment of Negro children by white classmates . . .
- (c) [improper influence by public officials].
- (d) Poverty. . . . Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;
- (e) Improvements . . . have been instituted in all-Negro schools . . . in a manner that tends to discourage Negroes from selecting white schools.

graphic attendance zone method. Their expectations were justified. Meaningful desegregation has not resulted from the use of free choice. Even when Negroes have transferred, however, desegregation has been a one-way street—a few Negroes moving into the white schools, but no whites transferring to the Negro schools. In most districts, therefore, as in the case before the Court, the vast majority of Negro pupils continue to attend school only with Negroes.

Although the proportion of Negroes in all-Negro schools has declined since *Brown*, more Negro children are now attending such schools than in 1954.²² Indeed, during the 1966-67 school year, a full 12 years years after *Brown*, more than 90% of the almost 3 million Negro pupils in the 11 Southern states still attended schools which were over 95% Negro and 83.1% were in schools which were 100% Negro.²³ And, in the case before the Court, 85% of the Negro pupils in New Kent County still attend schools with only Negroes. "This June, the vast majority of Negro children in the South who entered the first grade in 1955; the year after the *Brown* decision, were graduated from high school without ever attending a single class with a single white student."²⁴ Thus, as the Fifth Circuit has said, "[f]or all but a handful of Negro members of the High School Class of 1966, this right [to equal educational opportunities with white children in a racially non-discriminatory public school system] has been of such stuff as dreams are made on."²⁵

In its most recent report, the Civil Rights Commission states:

²² *Southern School Desegregation, 1966-67*, at p. 11.

²³ *Id.* at 165.

²⁴ *Id.* at 147.

²⁵ *United States v. Jefferson County Board of Education*, *supra*, 372 F.2d 836 at 845.

The review of desegregation under freedom of choice plans contained in this report, and that presented in last years commission's survey of southern school desegregation, show that *the freedom of choice plan is inadequate in the great majority of cases as an instrument for disestablishing a dual school system*. Such plans have not resulted in desegregation of Negro schools and therefore perpetuate one-half of the dual school system virtually intact. [Emphasis added]²⁶

II.

A Freedom of Choice Plan is Constitutionally Unacceptable Where There are Other Methods, no More Difficult to Administer, Which Would More Speedily Disestablish the Dual System.

The duty of a school board under *Brown*, in the mid-sixties (by now, the time for "deliberate speed" has long run out²⁷) is to adopt that plan which will most speedily accomplish the effective desegregation of the system. We quite willingly concede that a court should not enforce its will where alternative methods are not likely to produce dissimilar results—that much discretion should still be the province of the school board. We submit, however, that a

²⁶ *Southern School Desegregation, 1966-1967*, pp. 152-153. In an earlier report, *Racial Isolation in the Public Schools*, the Civil Rights Commission observed (at p. 69) that, "... the degree of school segregation in these free-choice systems remain high." and concluded that (*ibid*): "only limited school desegregation has been achieved under free choice plans in Southern and Border City school systems."

²⁷ Almost two years ago this Court stated, "more than a decade has passed since we directed desegregation of public school facilities with all deliberate speed. . . . Delays in desegregating school systems are no longer tolerable." *Bradley v. School Board of The City of Richmond*, 382 U.S. 103, 105. "There has been entirely too much deliberation and not enough speed . . ." *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 229. Cf. *Watson v. Memphis*, 373 U.S. 526, 533.

court may not—at this late date, in the absence of persuasive evidence showing the need for delay—permit the use of any plan other than that which will most speedily and effectively desegregate the system. Put another way, at this point, that method must be mandated which will do the job more quickly and effectively.

A. *The Obligation of a School Board Under Brown v. Board of Education is to Disestablish the Dual School System and to Achieve a Unitary, Non-racial System.*

At bottom, this controversy concerns the precise point at which a school board has fulfilled its obligations under *Brown I and II*. When free choice plans initially were conceived, courts generally adhered—mistakenly, we submit—to the belief that it was sufficient to permit each student an unrestricted free choice of schools. It was said that “desegregation” did not mean “integration” and that the availability of a free choice of schools, unencumbered by violence and other restrictions, was sufficient quite apart from whether any integration actually resulted.²⁸ Despite

²⁸ The doctrine probably had its genesis in the now famous dictum of Judge Parker in *Briggs v. Elliot*, 132 F.Supp. 776, 777 (E.D.S.C. 1955) “The Constitution . . . does not require integration. It merely forbids segregation”; See generally *Jeffers v. Whitley*, 309 F.2d 621, 629 (4th Cir. 1962); *Borders v. Rippey*, 247 F.2d 268, 271 (5th Cir. 1957); *Boson v. Rippey*, 285 F.2d 43, 48 (5th Cir. 1960); *Vick v. Board of Education of Obion County*, 205 F.Supp. 436 (W.D. Tenn. 1962); *Kelley v. Board of Education of the City of Nashville*, 270 F.2d 209, 229 (6th Cir. 1959).

In recent years, several courts in addition to that in *United States v. Jefferson County Board of Education*, *supra* (See discussion *infra* at pp. 23-25), have rejected the dictum in *Briggs*. Even before *Jefferson County*, Judge Wisdom had tersely observed that “Judge Parker’s well known dictum . . . should be laid to rest”. *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729, 730 (5th Cir. 1965). In *Kemp v. Beasley*, 352 F.2d 14, 21 (1965), the Eighth Circuit stated that “The dictum in *Briggs* has not been followed or adopted by this Circuit and is logically inconsistent with *Brown*.” To the same effect is *Kelley v. Altheimer Arkansas Public School District*, 378 F.2d 483, 488 (8th Cir. 1967). See also *Evans v. Ennis*, 281 F.2d 385, 389 (3rd Cir. 1960) where

its protestations, the majority below manifested much of this thinking (17-18a, 19a):

Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria, [freedom of choice] is an illusion and an oppression which is constitutionally impermissible . . .

Employed as descriptive of a system in which each pupil or his parents, must annually exercise an uninhibited choice, and the choices govern the assignments, it is a very different thing. * * *

Since plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination. (Emphasis added.)

At no point in its opinion did the majority meet the essence of petitioners' claim—that in view of related experience under the Pupil Placement laws, there was no good reason to believe that free choice would, in fact, desegregate the system and that the district court should have mandated the use of geographic zones which, on the evidence before it, would produce greater desegregation.

The notion that the making available of an unrestricted choice satisfies the Constitution, quite apart from whether significant numbers of white students choose Negro schools or Negro students choose white schools, is, we submit, fundamentally inconsistent with the decisions of this Court in *Brown I* and *II*, *Cooper v. Aaron*, 358 U.S. 1; *Bradley v.*

the court declared "The Supreme Court has unqualifiedly declared integration to be their constitutional right." Cf. *Blocker v. Board of Education of Manhasset*, 226 F.Supp. 208, 220, 221 (E.D.N.Y. 1964) and *Board of Education of Oklahoma City Public Schools, et al. v. Dowell*, 372 F.2d 158 (10th Cir. 1967).

School Board of the City of Richmond, 382 U.S. 103 and the entire series of school cases it has decided.²⁹ The Eighth Circuit has said:

A Board of Education does not satisfy its obligation to desegregate by simply opening the doors of a formerly all-white school to Negroes. [footnote omitted]

Kelley v. Altheimer Arkansas Public School District, *supra* at 488. And only recently, the Fifth Circuit, in a major school desegregation decision³⁰ that necessarily conflicts with the Fourth Circuit's, specifically rejected the argument that *Brown I* and the Constitution do not require integration but only an end to enforced segregation. Concluding that "integration" and "desegregation" mean one and the same thing, the Court used the terms interchangeably to mean the achievement of a "unitary non-racial [school] system". Said the Court (372 F.2d 836, 847 at Note 5):

Decision-making in this important area of the law cannot be made to turn upon a quibble devised over ten years ago by a court [Briggs] that misread *Brown*, misapplied the class action doctrine in the school desegregation cases, and did not foresee the development of the law of equal opportunities.

* * *

We use the terms "integration" and "desegregation" of formerly segregated public schools systems to mean the conversion of a formerly de jure system to a unitary, non-racial (non-discriminatory) system—lock,

²⁹ See *Rogers v. Paul*, 382 U.S. 198; *Calhoun v. Latimer*, 377 U.S. 263; *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218; *Goss v. Board of Education*, 373 U.S. 683.

³⁰ *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1967), *aff'd with modifications on rehearing en banc*, Civ. No. 23345, *March 1967*, petition for certiorari pending, Nos. 256, 282, 301.

stock and barrel: students, faculty, staff, facilities, programs and activities.

On rehearing *en banc* the majority put it this way (slip op. at 5):

[school] Boards and officials administering public schools in this circuit [footnote omitted] have the affirmative duty under the Fourteenth Amendment to bring about an integrated unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinion distinguishing between integration and desegregation [footnote omitted] must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual system in this circuit requires integration of faculties, facilities and activities, as well as students.

The Court went on to hold that the test for any school desegregation plan is whether the plan achieves the "substantial integration" which is constitutionally required and that a plan not accomplishing that result must be abandoned and another substituted (372 F.2d 836, 895-896).³¹ We sub-

³¹ The Court conceded, as we do here, that the Constitution does not require that "each and every child . . . attend a racially balanced school," nor that school officials achieve "a maximum of racial mixing." (372 F.2d 836, 846). It concluded, however, that school officials in formerly *de jure* systems have "an absolute duty to integrate." (*Ibid.*)

The Department of Health, Education and Welfare has also taken the position that a freedom of choice plan must work—result in actual integration. And under the *Revised Guidelines* the commissioner has the power, where the results under a free choice plan continue to be unsatisfactory, to require, as a precondition to the making available of further federal funds, that the school system adopt a different type of desegregation plan. *Revised Guidelines*, 45 CFR 181.54. Although administrative

scribe to that view and urge its plain and explicit adoption by this Court.

The majority opinion below, in true *Briggs* form, neither states nor implies such a requirement—that the plan “work.” The most it can be read to say is that while Negroes rightfully may complain if extraneous circumstances inhibit the making of a “truly free choice,” they have no basis to complain and the Constitution is satisfied if no such circumstances are shown. This is not an overharsh reading of the opinion. Only recently a writer observed:

The Fourth is apparently the only circuit of the three that continues to cling to the doctrine of *Briggs v. Elliot*, and embraces freedom of choice as a final answer to school desegregation in the absence of intimidation and harrassment.³²

Judge Sobeloff perceived this and exhorted the majority to “move out from under the incubus of the *Briggs v. Elliot* dictum and take [a] stand beside the Fifth and Eighth” Circuits.” (40a)

The Fifth Circuit in *Jefferson* did not hold, and we do not urge, that freedom of choice plans are unconstitutional *per se*. Indeed, in areas where residential segregation is

regulations propounded under Title VI of the Civil Rights Act of 1964 are not binding on courts determining private rights under the Fourteenth Amendment, nonetheless they are entitled to great weight in the formulation by the judiciary of constitutional standards. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137, 139-140; *United States v. American Trucking Associations, Inc.*, 310 U.S. 534; *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294; *United States v. Jefferson County*, *supra*, *en banc* slip op. at p. 7.

³² Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 Va. L. Rev. 42, 72 (1967).

³³ See *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965) discussed in Note 28, *supra*.

substantial and entrenched, a free choice plan might well be the most effective method of desegregation. Rather, our position is that a freedom of choice plan is not an "adequate" desegregation plan (Brown II, *supra*, 349 U.S. at 301), if there is another plan, equally feasible to administer, which will more speedily and effectively disestablish the dual system.

B. The Record Clearly Showed That a Freedom of Choice Plan Was Not Likely to Disestablish and Has Not Disestablished the Dual School System and That a Geographic Zone Plan Would Immediately Have Produced Substantial Desegregation.

Plaintiffs' exhibits showed, Judge Sobeloff observed, and the available census figures confirmed, that there was no residential segregation in New Kent County. Separate busses maintained for the races traversed all areas of the county picking up children to be taken to the school maintained for their race. Yet, instead of geographically zoning each school as logic and reason would seem to dictate,³⁴ and as it most certainly would have done had all children been of the same race, the School Board gratuitously adopted a free choice plan thereby incurring the administrative hardship of processing choice forms and of furnishing transportation to children choosing the school farthest from their homes. Indeed, in view of the lack of residential segregation it can fairly be concluded that the dual school system could not continue, as Judge Sobeloff has said (see p. 9 *supra*), but for free choice. Freedom of choice, then, has been, at least in this community, the means by which the

³⁴ Compare Judge Sobeloff's suggestion quoted at pp. 9-10, *supra* (27-28a) that the dual system could immediately be eliminated and a unitary non-racial system achieved by the assignment of students in the eastern half of the county to New Kent and those in the western half to Watkins.

State has continued, under the guise of desegregation, to maintain segregated schools.

The Board could not, in good faith, have hoped that enough students would choose the school previously closed to them to produce a truly integrated system. The evidence belies this. The Board had, for several years prior to the adoption of free choice in 1965,³⁵ operated under the Virginia Pupil Placement Act, under which any student, could, as in free choice, choose any school. When the New Kent Board adopted free choice, no Negro student had ever chosen to transfer to the white school and no white student had ever chosen to attend the Negro school. (R. Vol. 2, p. 28). Thus, at the time the Board adopted free choice, it was fairly clear, based on related experience under the Pupil Placement Law, that free choice would not disestablish the separate systems and produce a "unitary non-racial system."

Nor has it done so in the years since its adoption. During the most recent school year, 1966-67, only 111 of the 739 Negroes in the New Kent School district attended school with whites at the New Kent School. No whites chose to attend and, indeed, none have ever attended, Watkins, the Negro school. A full generation of school children after *Brown*, 85% of New Kent's Negro children still attended a school that was entirely Negro.

Nor did the Board introduce any evidence to justify its method, which, if it could disestablish the dual system at all (and, we think it clear that it could not), would require a much longer period of time than the method petitioners had urged upon the Court. As this Court said in *Brown II* (349 U.S. at 300):

³⁵ Although the Board adopted its plan in August, 1965, it was not approved by the Court and actually implemented until the Fall term of 1966.

The burden rests upon the defendants to establish that such time [in which to effectuate a transition to a racially non-discriminatory system] is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

It was, therefore, error for the Court below to approve the freedom of choice plan in the face of petitioner's proof, especially when the Board failed to show administrative reasons, cognizable by *Brown II*, justifying delay.

The data regarding assignment of teachers also reveal the failure of the Board to disestablish the dual system. The racial composition of the faculty at each school during the year just ended (1966-67) mirrored the racial composition of the student bodies. There were no Negroes among the 28 full-time teachers at the formerly all-white New Kent school. Only one Negro teacher was assigned there and that was for the equivalent of two days each week. No white teachers were assigned to the only Negro school, Watkins—all full-time teachers there were Negroes. Thus, neither of the only two schools in the county had lost, either in terms of its students or faculty, its racial identification.³⁶

³⁶ The failure of the Board to take meaningful steps to integrate its faculty is consistent with what the record shows: that the Board, by adopting freedom of choice, could not in good faith have believed or intended that the dual system would thereby be converted into the non-racial system required by the Constitution. "[F]aculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system". *Clark v. Board of Education, Little Rock School District*, 369 F.2d 661, 669-670 (8th Cir. 1966); *United States v. Jefferson County Board of Education*, *supra* (at 883-885); *Bradley v. School Board of the City of Richmond*, 382 U.S. 103; *Rogers v. Paul*, 382 U.S. 198.

The duty of the School Board was to convert the dual school system it had created in derogation of petitioners' rights into a "unitary non-racial system." As we have previously noticed it had alternatives—such as utilizing geographic zones or reshaping grade structures—which the record shows would have disestablished the dual system more speedily and with much less administrative hardship than that which it ultimately chose. More importantly, the success of its free choice plan depended on the ability of Negroes to unshackle themselves from the psychological effects of imposed racial discriminations of the past, and to withstand the fear and intimidation of the present and future. Neither of the other methods under which assignment would be involuntary—as it had been until *Brown*—would subject Negroes to the possibility of intimidation or give undue weight, as does free choice, to the very psychological effects of the dual system that this court found objectionable.³⁷ Instead of employing a procedure which would "as far as possible eliminate the discriminatory effects of the past" (cf. *Louisiana v. United States*, 380 U.S. 145) the Board has, by adopting free choice, utilized those discriminatory effects to maintain its essentially segregated system.

But for the relatively small number of Negro children attending the formerly white school, the schools in the county are operated substantially as before the *Brown* decision. "The transfer of a few Negro children to a white school does not", as the Fifth Circuit has observed, "do away with the dual system." *United States v. Jefferson County Board of Education*, *supra*, 372 F. 2d at 812. All

³⁷ In a related context, this Court has said:

It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. *Lane v. Wilson*, 307 U.S. 268, 276.

white pupils in New Kent County still attend the schools formerly maintained for their race; the overwhelming majority of Negroes still attend school only with other Negroes at Watkins. Here, as in most of the other districts utilizing free choice, one-half of the dual system has been retained intact. Nothing but race can explain the continued existence of this all-Negro school and defer indefinitely its elimination, where all races are scattered throughout the county. Freedom of choice has been in this county, the instrument by which the State has used its resources and authority to maintain the momentum of racial segregation.

The statistics demonstrate that freedom of choice has not effected, either in the county before the Court or in most districts in the southern and border states generally, a unitary non-discriminatory system. While its use in the immediate post-*Brown* years might have been justified as an interim or transitional device, one can hardly conceive any justification for its adoption as late as 1966, twelve years after *Brown*. Certainly, the record furnishes no administrative or other reasons for its retention in this county.

In the 13 years since *Brown I* and *II*, this Court—consistent with its early statement in *Brown II* that “the [district] courts, because of their proximity to local conditions . . . can best perform this judicial appraisal. (349 U.S. at 298)” —has rarely reviewed cases challenging desegregation plans (or provisions thereof) approved by the lower courts. But the rule is not without its exceptions and there have been several instances in which this Court has found it necessary to overturn the judgment of a lower court in a school desegregation case.³⁸

³⁸ The school desegregation cases which the court has reviewed are collected in Note 29, *supra* and accompanying text.

Standing to one side are the school cases, in which the Court acted to preserve, reaffirm, and vindicate, in the face of crude local opposition, the very basis of federal authority. In this category are *Cooper v. Aaron*, 358 U. S. 1 and *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218.

The other cases are those in which the Court has reviewed the provisions of a plan; they are few and far between but have a common characteristic: the issue posed is one upon which the continuation of the desegregation process depended. In *Goss v. Board of Education*, 373 U.S. 683 (1963), the question concerned the validity of provisions in desegregation plans entitling a student, solely on the basis of race, to obtain a transfer from a school in which he would be in the racial minority, back to his former segregated school where his race would be in the majority. Such provisions were widely being adopted with the approval of the lower courts, even though, as this court found, their effect was to perpetuate segregation. It was absolutely necessary, therefore, to prevent the desegregation process (which had barely begun) from being brought to a resounding halt, that this Court, as it did, hear the case and instruct the lower courts that such provisions were constitutionally unacceptable. So too, in *Bradley v. School Board of the City of Richmond*, 382 U.S. 103 and *Rogers v. Paul*, 382 U.S. 198, this Court, faced with increasing litigation concerning teacher desegregation and the unwillingness of lower courts to afford relief, recognized that teacher desegregation was a necessary element of the overall desegregation process and directed that the courts turn their attention to it. We submit that the question in this case is as important to the ultimate successful dismantling of the dual systems in *Brown*—affected states as was the question in *Goss*.

The sheer ubiquitousness of freedom of choice plans,³⁹ the chorus with which they have uniformly been condemned and their evident failure to disestablish the dual systems a full thirteen years after the *Brown* decision demonstrates that the time has come for this Court to subject their use to careful scrutiny. We repeat, however, that our thrust is limited rather than general; we do not urge that a freedom of choice plan is unconstitutional *per se* and may never be used. Our submission is simply that it may not be used where on the face of the record there is little reason to believe it will be successful and there are other methods, more easily administered, which will more speedily and effectively disestablish the dual system.⁴⁰ The constitutionality of the continued use of a free choice plan in that context merits the attention of this Court.

³⁹ See Note 15, *supra*.

⁴⁰ A trend away from freedom of choice seems to have developed recently in some of the lower courts. And a recent order of a district court in Virginia appears to have adopted the view we urge. See *Corbin v. County School Board of Loudon County, Virginia*, C.A. No. 2737, August 27, 1967. In Loudon County, as in this case, Negroes were scattered throughout the County. The district court had approved in May, 1963 a freedom of choice plan of desegregation. In April, 1967, plaintiffs and the United States filed motions for further relief contending that the freedom of choice plan had resulted in only token or minimal desegregation with the majority of Negroes still attending all Negro Schools. They requested that the district be ordered to desegregate by means of unitary geographic attendance zones drawn without regard to race. The district court agreed and on August 27th entered an order directing that:

No later than the commencement of the 1968-69 school year the Loudon County Elementary Schools shall be operated on the basis of a system of compact, unitary, non-racial geographic attendance zones in which, there shall be no schools staffed or attended solely by Negroes. Upon the completion of the New Broad Run High School, the high schools shall be operated on a like basis.

Cf. Orders requiring the use of geographic zones in *Coppedge v. Franklin County Board of Education*, C.A. 1796, decided August 17, 1967, discussed in Note 20, *supra*, and *Braxton v. Board of Public Instruction of Duval County, Florida*, No. 4598 (M.D. Fla.), January 24, 1967.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Memorandum of the Court

(Filed May 17, 1966)

The infant plaintiffs, as pupils or prospective pupils in the public schools of New Kent County, and their parents or guardians have brought this class action asking that the defendants be required to adopt and implement a plan which will provide for the prompt and efficient racial desegregation of the county schools, and that the defendants be enjoined from building schools or additions and from purchasing school sites pending the court's approval of a plan. The plaintiffs also seek attorney's fees and costs.

The defendants have moved to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted. They have also answered denying the material allegations of the bill.

The facts are uncontested.

New Kent is a rural county located east of the City of Richmond. Its school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The school board operates one white combined elementary and high school, and one Negro combined elementary and high school. There are no attendance zones. Each school serves the entire county. Indian students attend a school in Charles City County.

On August 2, 1965 the county school board adopted a freedom of choice plan to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000.d-1, *et seq.* The choices include the Indian school in Charles City County. The county had operated under the Pupil Placement Act, §§ 22-232.1, *et seq.*, Code of Virginia, 1950, as amended. As of September 1964 no Negro pupil had applied for

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admission to the white school. No Negro faculty member serves in the white school and no white faculty member serves in the Negro school.

New construction is scheduled at both county schools. The case is controlled by the principles expressed in *Wright v. School Bd. of Greenville County, Va.*, No. 4263 (E.D. Va., Jan. 27, 1966). An order similar to that entered in *Greenville* will deny an injunction restraining construction and grant leave to submit an amendment to the plan for employment and assignment of staff on a non-racial basis. The motion for counsel fees will be denied.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

Order

(Filed May 17, 1966)

For reasons stated in the Memorandum of the Court this day filed and in the Memorandum of the Court in *Wright v. County School Board of Greenville County, Virginia*, Civil Action No. 4263 (E.D. Va., Jan. 27, 1966),

It is ADJUDGED and ORDERED:

1. The defendants' motion to dismiss is denied;
2. The plaintiffs' prayer for an injunction restraining school construction and the purchase of school sites is denied;
3. The defendants are granted leave to submit on or before June 6, 1966 amendments to their plan which will provide for employment and assignment of the staff on a non-racial basis. Pending receipt of these amendments, the court will defer approval of the plan and consideration of other injunctive relief;
4. The plaintiffs' motion for counsel fees is denied;
5. The case will be retained upon the docket with leave granted to any party to petition for further relief.

The plaintiffs shall recover their costs to date.

Let the Clerk send copies of this order and the Memorandum of the Court to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

Memorandum of the Court

(Filed June 28, 1966)

This memorandum supplements the memorandum of the court filed May 17, 1966. The court deferred ruling on the school board's plan of desegregation until after the board had an opportunity to amend the plan to provide for allocation of faculty and staff on a non-racial basis. The board has filed a supplement to the plan to accomplish this purpose.

The plan and supplement are:

I.

ANNUAL FREEDOM OF CHOICE OF SCHOOLS

A. The County School Board of New Kent County has adopted a policy of complete freedom of choice to be offered in grades 1, 2, 8, 9, 10, 11, and 12 of all schools without regard to race, color, or national origin, for 1965-66 and all grades after 1965-66.

B. The choice is granted to parents, guardians and persons acting as parents (hereafter called 'parents') and their children. Teachers, principals and other school personnel are not permitted to advise, recommend or otherwise influence choices. They are not permitted to favor or penalize children because of choices.

II.

PUPILS ENTERING OTHER GRADES

Registration for the first grade will take place, after conspicuous advertising two weeks in advance of registration, between April 1 and May 31 from 9:00 A.M. to 2:00 P.M.

When registering, the parent will complete a Choice of

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School Form for the child. The child may be registered at any elementary school in this system, and the choice made may be for that school or for any other elementary school in the system. The provisions of Section VI of this plan with respect to overcrowding shall apply in the assignment to schools of children entering first grade.

III.

PUPILS ENTERING OTHER GRADES

A. Each parent will be sent a letter annually explaining the provisions of the plan, together with a Choice of School Form and a self-addressed return envelope, by April 1 of each year for pre-school children and May 15 for others. Choice forms and copies of the letter to parents will also be readily available to parents or students and the general public in the school offices during regular business hours. Section VI applies.

B. The Choice of School Form must be either mailed or brought to any school or to the Superintendent's Office by May 31st of each year. Pupils entering grade one (1) of the elementary school or grade eight (8) of the high school must express a choice as a condition for enrollment. Any pupil in grades other than grades 1 and 8 for whom a choice of school is not obtained will be assigned to the school he is now attending.

IV.

PUPILS NEWLY ENTERING SCHOOL SYSTEM OR CHANGING RESIDENCE WITHIN IT

A. Parents of children moving into the area served by this school system, or changing their residence within it,

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after the registration period is completed but before the opening of the school year, will have the same opportunity to choose their children's school just before school opens during the week of August 30th, by completing a Choice of School Form. The child may be registered at any school in the system containing the grade he will enter, and the choice made may be for that school or for any other such school in the system. However, first preference in choice of schools will be given to those whose Choice of School Form is returned by the final date for making choice in the regular registration period. Otherwise, Section VI applies. ♣

B. Children moving into the area served by this school system, or changing their residence within it, after the late registration period referred to above but before the next regular registration period, shall be provided with registration forms. This has been done in the past.

V.

RESIDENT AND NON-RESIDENT ATTENDANCE

This system will not accept non-resident students, nor will it make arrangements for resident students to attend public schools in other school systems where either action would tend to preserve segregation or minimize desegregation. Any arrangement made for non-resident students to attend public schools in this system, or for resident students to attend public schools in another system, will assure that such students will be assigned without regard to race, color, or national origin, and such arrangement will be explained fully in an attachment made a part of this plan. Agreement attached for Indian children.

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VI.

OVERCROWDING

A. No choice will be denied for any reason other than overcrowding. Where a school would become overcrowded if all choices for that school were granted, pupils choosing that school will be assigned so that they may attend the school of their choice nearest to their homes. No preference will be given for prior attendance at the school.

B. The Board plans to relieve overcrowding by building during 1965-66 for the 1966-67 session.

VII.

TRANSPORTATION

Transportation will be provided on an equal basis without segregation or other discrimination because of race, color, or national origin. The right to attend any school in the system will not be restricted by transportation policies or practices. To the maximum extent feasible, busses will be routed so as to serve each pupil choosing any school in the system. In any event, every student eligible for bussing shall be transported to the school of his choice if he chooses either the formerly white, Negro or Indian school.

VIII.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

There shall be no discrimination based on race, color, or national origin with respect to any services, facilities, activities and programs sponsored by or affiliated with the schools of this school system.

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IX.

STAFF DESEGREGATION

A. Teacher and staff desegregation is a necessary part of school desegregation. Steps shall be taken beginning with school year 1965-66 toward elimination of segregation of teaching and staff personnel based on race, color, or national origin, including joint faculty meetings, in-service programs, workshops, other professional meetings and other steps as set forth in Attachment C.

B. The race, color, or national origin of pupils will not be a factor in the initial assignment to a particular school or within a school of teachers, administrators or other employees who serve pupils, beginning in 1966-67.

C. This school system will not demote or refuse to re-employ principals, teachers and other staff members who serve pupils, on the basis of race, color, or national origin; this includes any demotion or failure to reemploy staff members because of actual or expected loss of enrollment in a school.

D. Attachment D hereto consists of a tabular statement, broken down by race, showing: 1) the number of faculty and staff members employed by this system in 1964-65; 2) comparable data for 1965-66; 3) the number of such personnel demoted, discharged or not re-employed for 1965-66; 4) the number of such personnel newly employed for 1965-66. Attachment D further consists of a certification that in each case of demotion, discharge or failure to re-employ, such action was taken wholly without regard to race, color, or national origin.

*Memorandum of the Court***X.****PUBLICITY AND COMMUNITY PREPARATION**

Immediately upon the acceptance of this plan by the U. S. Commissioner of Education, and once a month before final date of making choices in 1966, copies of this plan will be made available to all interested citizens and will be given to all television and radio stations and all newspapers serving this area. They will be asked to give conspicuous publicity to the plan in local news sections of the Richmond papers. The newspaper coverage will set forth the text of the plan, the letter to parents and Choice of School Form. Similar prominent notice of the choice provision will be arranged for at least one a month thereafter until the final date for making choice. In addition, meetings and conferences have been and will be called to inform all school system staff members of, and to prepare them for, the school desegregation process, including staff desegregation. Similar meetings will be held to inform Parent-Teacher Associations and other local community organizations of the details of the plan, to prepare them for the changes that will take place.

SUPPLEMENT

"The School Board of New Kent County recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the school systems without regard to race, color or national origin. We further recognize our obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color.

Memorandum of the Court

"The New Kent Board recognizes the fact that New Kent County has a problem which differs from most counties in that the white citizens are the minority group. The Board is also cognizant of the fact that race relations are generally good in this county, and Negro citizens share in county government. A Negro citizen is a member of the County Board of Supervisors at the present time.

"In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other staff members among the various schools of this system will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools.

"The following procedures will be followed to carry out the above stated policy:

1. The best person will be sought for each position without regard to race, and the Board will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties. We will not select a person of less ability just to accomplish desegregation.

2. Institutions, agencies, organization, and individuals that refer teacher applicants to the schools system will be informed of the above stated policy for faculty desegregation and will be asked to so inform persons seeking referrals.

3. The School Board will take affirmative steps to allow teachers presently employed to accept transfers to schools in which the majority of the faculty members

Memorandum of the Court

are of a race different from that of the teacher to be transferred.

4. No new teacher will be hereafter employed who is not willing to accept assignment to a desegregated faculty or in a desegregated school.

5. All workshops and in-service training programs are now and will continue to be conducted on a completely desegregated basis.

6. All members of the supervisory staff will be assigned to cover schools, grades, teachers and pupils without regard to race, color or national origin.

7. All staff meetings and committee meetings that are called to plan, choose materials, and to improve the total educational process of the division are now and will continue to be conducted on a completely desegregated basis.

8. All custodial help, cafeteria workers, maintenance workers, bus mechanics and the like will continue to be employed without regard to race, color or national origin.

9. Arrangements will be made for teachers of one race to visit and observe a classroom consisting of a teacher and pupils of another race to promote acquaintance and understanding."

The plaintiffs filed exceptions to the supplement charging that it does not contain well defined procedures which will be put into effect on definite dates and that it demonstrates the board's refusal to take any initiative to desegregate the staff.

Memorandum of the Court

The plan for faculty desegregation is not as definite as some plans received from other school districts. The court is of the opinion, however, that no rigid formula should be required. The plan will enable the school board to achieve allocation of faculty and staff on a non-racial basis. The plan and supplement satisfy the criteria mentioned in *Wright v. School Board of Greensville County, Va.*, No. 4263 (E.D. Va., Jan. 27 and May 13, 1966).

Provision should be made for a registration period in the summer or immediately prior to the beginning of the 1966-67 term to allow pupils to exercise their choice of school. This is necessary because the supplement to the plan was adopted late in the school year. The summer or fall registration should present no administrative difficulties. Many of the schools which have adopted a freedom of choice plan provide for such registration as a matter of course.

It may become necessary for the board to modify the plan. It may become necessary to revoke in full or in part the approval that the court has given the plan. The case will remain on the docket for any of the parties to seek relief which future circumstances may require.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

Order

(Entered June 28, 1966)

For reasons stated in the memorandum of the court this day filed and in *Wright v. School Board of Greensville County, Va.*, No. 4263 (E.D. Va., Jan. 27 and May 13, 1966), it is ADJUDGED and ORDERED that the plan adopted by the New Kent County School Board is approved.

This case will be retained on the docket with leave granted to any party to seek further relief.

Let the Clerk send copies of this order and of the memorandum of the court to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

**Decision of the United States Court of Appeals
For the Fourth Circuit**

No. 10,792.

Charles C. Green, Carroll A. Green and Robert C. Green,
infants, by Calvin C. Green and Mary O. Green,
their father and mother and next friends,
and all others of the plaintiffs,
Appellants,

versus

County School Board of New Kent County, Virginia, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
JOHN D. BUTNER, JR., DISTRICT JUDGE.

(Argued January 9, 1967. Decided June 12, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN,
BRYAN, J. SPENCER BELL,* WINTER and CRAVEN, Circuit
Judges, sitting en banc.

S. W. Tucker (Henry L. Marsh, III, Willard H. Douglas,
Jr., Jack Greenberg and James M. Nabrit, III, on brief)
for Appellants, and Frederick T. Gray (Williams, Mullen
& Christian on brief) for Appellees.

* Judge Bell sat as a member of the Court when the case was heard
but died before it was decided.

*Decision of the United States Court of Appeals
For the Fourth Circuit*

PER CURIAM :

The questions presented in this case are substantially the same as those we have considered and decided today in *Bowman v. County School Bd. of Charles City County*.¹ For the reasons stated there, the rulings of the District Court merit our substantial approval, but the case is necessarily remanded for further proceedings in accordance with the District Court's order and our opinion in *Bowman*.

Remanded.

¹ 4 Cir. F.2d (Decided this day). The special concurring opinion of Judge Sobeloff, in which Judge Winter joins, in *Bowman* is applicable to this case also.

**Opinion of the United States Court of Appeals
For the Fourth Circuit**

No. 10,793.

Shirlette L. Bowman, Rhoda M. Bowman, Mildred A. Bowman, Richard M. Bowman and Sandra L. Bowman, infants, by Richard M. Bowman, their father and next friend, and all others of the plaintiffs,
Appellants,

versus

County School Board of Charles City County,
Virginia, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued January 9, 1967. Decided June 12, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, J. SPENCER BELL,* WINTER and CRAVEN, Circuit Judges, sitting en banc.

S. W. Tucker (Henry L. Marsh, III, Willard H. Douglas, Jr., Jack Greenberg and James M. Nabrit, III, on brief) for Appellants, and Frederick T. Gray (Williams, Mullen & Christian on brief) for Appellees.

* Judge Bell sat as a member of the Court when the case was heard but died before it was decided.

*Opinion of the United States Court of Appeals
For the Fourth Circuit*

HAYNSWORTH, Chief Judge:

In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged "unrestricted right" to attend any school in the system he wishes. They contend that compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention, though a related point affecting the assignment of teachers is not without merit.

I

"Freedom of choice" is a phrase of many connotations.

Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria, it is an illusion and an oppression which is constitutionally impermissible. Long since, this court has condemned it.¹ The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents. It is the duty of the school boards to eliminate the discrimination which inheres in such a system.

Employed as descriptive of a system in which each pupil, or his parents, must annually exercise an uninhibited choice, and the choices govern the assignments, it is a very different

¹ *Nesbit v. Statesville City Bd. of Educ.*, 4 Cir., 345 F.2d 333, 334 n. 3; *Bradley v. School Bd. of Educ. of City of Richmond*, 4 Cir., 345 F.2d 310, 319 & n. 18; *Wheeler v. Durham City Bd. of Educ.*, 4 Cir., 309 F.2d 630, 633; *Jeffers v. Whitley*, 4 Cir., 309 F.2d 621; *Marsh v. County School Bd. of Roanoke County*, 4 Cir., 305 F.2d 94; *Green v. School Bd. of City of Roanoke*, 4 Cir., 304 F.2d 118; *Hill v. School Bd. of City of Norfolk*, 4 Cir., 282 F.2d 473; *Jones v. School Bd. of City of Alexandria*, 4 Cir., 278 F.2d 72.

*Opinion of the United States Court of Appeals
For the Fourth Circuit*

thing. If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held,² and we adhere to our holdings.

Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for "freedom of choice" is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them.

A panel of the Fifth Circuit³ recently had occasion to concentrate its guns upon the sort of "freedom of choice" plan we have not tolerated, but, significantly, the decree it prescribed for its district courts requires the kind of "freedom of choice" plan we have held requisite and embodies standards no more exacting than those we have imposed and sanctioned.

The fact that the Department of Health, Education and Welfare has approved the School Board's plan is not determinative. The actions of that department, as its guidelines, are entitled to respectful consideration⁴ for, in large mea-

² *Wheeler v. Durham City Bd. of Educ.*, 4 Cir., 346 F.2d 768, 773; *Bradley v. School Bd. of Educ. of City of Richmond*, 4 Cir., 345 F.2d 310, 313, *vacated and remanded on other grounds*, 382 U.S. 103. See *Jeffers v. Whitley*, 4 Cir., 309 F.2d 621.

³ *United States v. Jefferson County Board of Education*, 5 Cir., 372 F.2d 836, *aff'd on rehearing en banc*, F.2d; *see also*, *Deal v. Cincinnati Board of Education*, 6 Cir., 369 F.2d 55.

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For the Fourth Circuit.*

sure or entirely, they are a reflection of earlier judicial opinions. We reach our conclusion independently, for, while administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards controlling the actions of states and their subdivisions is peculiarly a judicial function.

Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination.

II

Appropriately, the School Board's plan included provisions for desegregation of the faculties. Supplemented at the direction of the District Court, those provisions are set forth in the margin.⁴

⁴ The School Board of Charles City County recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the school systems without regard to race, color or national origin. We further recognize our obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color.

In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other staff members among the various schools of this system will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools.

The following procedures will be followed to carry out the above stated policy:

1. The best person will be sought for each position without regard to race, and the Board will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties.
2. Institutions, agencies, organizations, and individuals that refer teacher applicants to the school system will be informed of the

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For the Fourth Circuit*

These the District Court found acceptable under our decision in *Wheeler v. Durham City Board of Education*, 363 F.2d 738, but retained jurisdiction to entertain applications for further relief. It acted upon a record which showed that white teachers had been assigned to the "Indian school"

above stated policy for faculty desegregation and will be asked to so inform persons seeking referrals.

3. The School Board will take affirmative steps including personal conferences with members of the present faculty to allow and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.
4. No new teacher will be hereafter employed who is not willing to accept assignment to a desegregated faculty or in a desegregated school.
5. All Workshops and in-service training programs are now and will continue to be conducted on a completely desegregated basis.
6. All members of the supervisory staff have been and will continue to be assigned to cover schools, grades, teachers and pupils without regard to race, color or national origin.
7. It is recognized that it is more desirous, where possible, to have more than one teacher of the minority race (white or Negro) on a desegregated faculty.
8. All staff meetings and committee meetings that are called to plan, choose materials, and to improve the total educational process of the division are now and will continue to be conducted on a completely desegregated basis.
9. All custodial help, cafeteria workers, maintenance workers, bus mechanics and the like will continue to be employed without regard to race, color or national origin.
10. Arrangements will be made for teachers of one race to visit and observe a classroom consisting of a teacher and pupils of another race to promote acquaintance and understanding.
11. The School Board and superintendent will exercise their best efforts, individually and collectively, to explain this program to school patrons and other citizens of Charles City County and to solicit their support of it.

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For the Fourth Circuit*

and one Negro teacher had been assigned to a formerly all white school.

The appellants' complaint is that the plan is insufficiently specific in the absence of an immediate requirement of substantial interracial assignment of all teachers.

On this record, we are unable to say what impact such an order might have upon the school system or what administrative difficulties might be encountered in complying with it. Elimination of discrimination in the employment and assignment of teachers and administrative employees can be no longer deferred,⁵ but involuntary reassignment of teachers to achieve racial blending of faculties in each school is not a present requirement on the kind of record before us. Clearly, the District Court's retention of jurisdiction was for the purpose of swift judicial appraisal of the practical consequences of the School Board's plan and of the objective criteria by which its performance of its declared purposes could be measured.

An appeal having been taken, we lack the more current information which the District Court, upon application to it, could have commanded. Without such information, an order of remand, the inevitable result of this appeal, must be less explicit than the District Court's order, with the benefit of such information, might have been.

While the District Court's approval of the plan with its retention of jurisdiction may have been quite acceptable when entered, we think any subsequent order, in light of the appellants' complaints should incorporate some minimal, objective time table.

⁵ *Bradley v. School Bd. of Educ. of City of Richmond*, 382 U.S. 103; *Wheeler v. Durham City Bd. of Educ.*, 4 Cir., 363 F.2d 738.

Concurring Opinion of Judges Sobeloff and Winter

Quite recently, a panel of the Fifth Circuit Court of Appeals⁶ has required some progress in faculty integration for the school year 1967-68. By that decree, school boards are required to take affirmative steps to accomplish substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year and, wherever possible, to assign more than one member of the minority race to each desegregated faculty. As much should be required here. Indeed, since there was an earlier start in this case, the District Court, with the benefit of current information, should find it appropriate to fashion an order which is much more specific and more comprehensive. What is done on remand, however, must be done upon a supplemented record after an appraisal of the practical, administrative and other problems, if any, remaining to be solved and overcome.

Remanded.

SOBELOFF, Circuit Judge, with whom WINTER, Circuit Judge, joins, concurring specially.

Willingly, I join in the remand of the cases* to the District Court, for I concur in what this court orders. I disagree, however, with the limited scope of the remand, for I think that the District Court should be directed not only to incorporate an objective timetable in the School Boards' plans for faculty desegregation, but also to set up proce-

⁶ United States v. Jefferson County Bd. of Educ., fn. 3, *supra*.

* This special concurrence is directed not only to Bowman v. County School Bd. of Charles City County, but also Green v. County School Bd. of New Kent County, F.2d, decided this day.

Concurring Opinion of Judges Sobeloff and Winter

dures for periodically evaluating the effectiveness of the Boards' "freedom of choice" plans in the elimination of other features of a segregated school system.

With all respect, I think that the opinion of the court is regrettably deficient in failing to spell out specific directions for the guidance of the District Court. The danger from an unspecific remand is that it may result in another round of unsatisfactory plans that will require yet another appeal and involve further loss of time. The bland discussion in the majority opinion must necessarily be pitched differently if the facts are squarely faced. As it is, the opinion omits almost entirely a factual recital. For an understanding of the stark inadequacy of the plans promulgated by the school authorities, it is necessary to explore the facts of the two cases.

New Kent County. Approximately 1,290 children attend the public schools of New Kent County. The system operated by the School Board consists of only two schools—the New Kent School, attended by all of the county's white pupils, and the Watkins School, attended by all of the county's Negro pupils.

There is no residential segregation and both races are diffused generally throughout the county. Yet eleven buses traverse the *entire* county to pick up the Negro students and carry them to the Watkins School, located in the western half of the county, and ten other buses traverse the *entire* county to pick up the white students for the New Kent School, located in the eastern half of the county. One additional bus takes the county's 18 Indian children to the "Indian" school, located in an adjoining county. Each of the county's two schools has 26 teachers and they offer identical programs of instruction.

Concurring Opinion of Judges Sobeloff and Winter

Repeated petitions from Negro parents, requesting the adoption of a plan to eliminate racial discrimination, were totally ignored. Not until some months after the present action had been instituted on March 15, 1965, did the School Board adopt its "freedom of choice" plan.¹

The above data relate to the 1964-1965 school year.² Since the Board's "freedom of choice" plan has now been in effect for *two* years as to grades 1, 2, 8, 9, 10, 11 and 12 and one year as to all other grades, clearly this court's remand should embrace an order requiring an evaluation of the success of the plan's operation over that time span, not only as to faculty but as to pupil integration as well. While the court does not order an inquiry in the District Court as to pupil integration, it of course does not forbid it. Since the District Judge retained the case on the docket, the matter will be open on remand to a thorough appraisal.

Charles City County. Approximately 1,800 children attend public schools in Charles City County. As in New Kent County, Negroes and whites live in the same neighborhoods and, similarly, segregated buses (Negro, Indian and white) traverse many of the same routes to pick up their respective

¹ As this circuit has elsewhere said, "Such a last minute change of heart is suspect, to say the least." *Cypress v. The Newport News General & Nonsectarian Hospital Ass'n*, F.2d, (4th Cir. Mar. 9, 1967). See also *Lankford v. Gelston*, 364 F.2d 197, 203 (4th Cir. 1966). Of course, in the present case, the District Court has noted that the plan was adopted in order to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000.d-1 (1964), and thus ensure the flow of federal funds.

² These data are culled from answers to plaintiffs' interrogatories. Neither side has furnished us or the District Court with more recent data. In oral argument, the defendant replied obscurely and unspecifically to inquiries from the bench as to what progress the county had made.

Concurring Opinion of Judges Sobeloff and Winter

charges.³ The Board operates four schools in all—Ruthville, a combined elementary and high school exclusively for Negroes; Barnetts, a Negro elementary school; Charles City, a combined elementary and high school for whites; and Samaria, a combined elementary and high school for Indian children. Thus, as plaintiffs point out, the Board, well into the second decade after the 1954 *Brown* decision, still maintains “what is in effect three distinct school systems—each organized along racial lines—with hardly enough pupils for one system!”⁴ The District Court found that “the Negro elementary schools serve geographical areas. The other schools serve the entire county.”⁵ This contrasting treatment of the races plainly exposes the prevailing discrimination. For the 1964-65 school year, only eight Negro children were assigned to grades 4, 6, 7, 8, 9, 10 and 11 at the all-white Charles City School—an instance of the feeblest and most inconsequential tokenism.

Again, as in New Kent County, Negro parents on several occasions fruitlessly petitioned the School Board to adopt a desegregation plan. This suit was instituted on March 15,

³ The Eighth Circuit has recently held that the operation of two school buses, one for Negro children and one for white, along the same route, is impermissible. “While we have no authority to strike down transportation systems because they are costly and inefficient, we must strike them down if their operation serves to discourage the desegregation of the school systems.” *Kelley v. Arkansas Public School District*, 35 U.S.L. WEEK 2619 (8th Cir. 12, 1967).

⁴ The Board seems to go to an extreme of inefficiency and expense in order to maintain the segregated character of its schools, indulging in the luxury of three separate high school departments to serve a total of approximately 600 pupils, 437 of whom are in one school, and three separate and overlapping bus services.

⁵ F.Supp., (1966),

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1965 and the Board adopted the plan presently under consideration on August 6, 1965. Not until June 1966 did the Board assign a single Negro teacher to the all-white faculty at Charles City School. Apart from this faint gesture, however, the faculties of the Negro and white schools remain totally segregated.⁶

The majority opinion implies that this court has gone as far as the Fifth Circuit and that the "freedom of choice" plan which that circuit has directed its district courts to prescribe "embodies standards no more exacting than those we have imposed and sanctioned." If this court is willing to go as far as the Fifth Circuit has gone, I welcome the resolve.⁷ It may be profitable, therefore, to examine closely what the Court of Appeals of that jurisdiction has recently said and done.⁸ We may then see how much further our court needs to go to bring itself abreast of the Fifth Circuit.

⁶ Three of the Board's eight teachers in the 175 pupil "Indian" school are white, the other five are Indian.

The Board asserts that it is "earnestly" seeking white teachers for the nine existing vacancies in the Negro schools, but so far its efforts have not met with success. This is not surprising, considering that the Board has formally declared that it "does not propose to advertise" vacancies in papers as this would likely cause people of both races to apply who are not qualified to teach."

⁷ A recent article in the Virginia Law Review declares the Fifth Circuit to be "at once the most prolific and the most progressive court in the nation on the subject of school desegregation." Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 73 (1967).

⁸ *United States v. Jefferson County Bd. of Educ.*, _____ F.2d _____ (5th Cir. 1966), *aff'd on rehearing en banc*, _____ F.2d _____ (5th Cir., Mar. 29, 1967).

*Concurring Opinion of Judges Sobeloff and Winter**I. Pupils*

Under the plans of both Charles City County and New Kent County, only children entering grades one or eight are *required* to express a choice. Freedom of choice is *permitted* children in all other grades, and "any pupil in grades other than grades 1 and 8 for whom a choice of school is not obtained *will be assigned to the school he is now attending.*"

In sharp contrast, the Fifth Circuit has expressly abolished "permissive" freedom of choice and ordered *mandatory* annual free choice for all grades, and "any student who has not exercised his choice of school within a week after school opens *shall be assigned to the school nearest his home . . .*"⁹ This is all that plaintiffs have been vainly seeking in New Kent County—that students be assigned to the schools nearest their homes.

If, in our cases, those who failed to exercise a choice were to be assigned to the schools nearest their homes, as the Fifth Circuit plan provides, instead of to the schools they previously attended, as directed in the plans before us, there would be a measure of progress in overcoming discrimination. As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins

⁹ United States v. Jefferson County Bd. of Educ., _____ F.2d _____, _____ (5th Cir., Mar. 29, 1967) (en banc). (Emphasis supplied.)

Concurring Opinion of Judges Sobeloff and Winter

School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient.

In Charles City County, *Negro* elementary school children are geographically zoned, while *white* elementary school children are not, despite the conceded fact that the children of both races live in all sections of the county. Surely this curious arrangement is continued to prop up and preserve the dual school system proscribed by the Constitution and interdicted by the Fifth Circuit . . .

"The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an *integrated, unitary* school system in which there are no Negro schools and no white schools—just schools. * * * In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the *dual school system* in this circuit requires integration of faculties, facilities, and activities, as well as students." ¹⁰

The Fifth Circuit stresses that the goal is "a unitary, non-racial system" and the question is whether a free choice plan will materially further the attainment of this goal.

¹⁰ F.2d at (en banc). (Emphasis supplied.)

Concurring Opinion of Judges Sobeloff and Winter

Stating that courts must continually check the sufficiency of school boards' progress toward the goal, the Fifth Circuit decree requires school authorities to report regularly to the district courts to enable them to evaluate compliance "by measuring the performance." In fashioning its decree, that circuit gave great weight to the percentages referred to in the HEW Guidelines,¹¹ declaring that they establish "minimum" standards

"for measuring the effectiveness of freedom of choice as a useful tool. * * * If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; *they should try other tools.*"¹²

¹¹ "[S]trong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities. [Footnote omitted.] But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court."

United States v. Jefferson County Bd. of Educ., F.2d, (5th Cir., Dec. 29, 1966), *adopted en banc*, F.2d (5th Cir., Mar. 29, 1967). Cf. Cypress v. Newport News Gen. Hosp., F.2d, n.15 (4th Cir., Mar. 9, 1967).

¹² F.2d (Emphasis supplied.) The HEW Guidelines provide: (1) if 8 or 9 percent of the Negro students in a school district transferred from segregated schools during the first year of the plan, the total transfers the following year must be on the order of at least *twice* that percentage; (2) if only 4 or 5 percent transferred, a "substantial" increase in the transfers will be expected the following year—bringing the

Concurring Opinion, of Judges Sobeloff and Winter

"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects.¹³ If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a "unitary, non-racial system."

While I would prefer it if this court were more explicit in establishing requirements for periodic reporting by the school officials, I assume that the District Court will do this, rather than place the burden upon the plaintiffs to collect the essential data to show whether the free choice

total to at least *triple* the percentage of the previous year; (3) if less than 4 percent transferred the previous year, then the rate of increase in total transfers for the following year must be proportionately greater than that under (2); and (4) if no students transferred under a free choice plan, then unless a very "substantial start" is made in the following year, the school authorities will "be required to adopt a different type of plan." HEW Reg. A., 45 C.F.R. § 181.54 (Supp. 1966).

In both New Kent County and Charles City County, at least some grades have operated under a "freedom of choice" plan for two years. In Charles City County, only 0.6% of the Negro students transferred to the white school for the 1964-65 session. Under the standards subscribed to by the Fifth Circuit, therefore, a minimum of 6% of the Negro pupils in that county should have transferred to the "white" school the following year. Less than this percentage would indicate that the free choice plan was "ineffective, longer on promises than performance," and that the school officials "should try other tools"—e.g., geographic zoning or pairing of grades.

In New Kent County, no Negro students transferred during the first year of the plan. Thus, unless the requisite "substantial start" was made the following year, school officials must adopt a different plan—one that will work.

¹³ Judge Wisdom, in *Singleton v. Jackson Munic. Separate School Dist.*, 355 F.2d 865, 871 (5th Cir. 1966), referred to "freedom of choice" plans as a "haphazard basis" for the administration of schools.

Concurring Opinion of Judges Sobeloff and Winter

plan is materially furthering the achievement of "a unitary, non-racial system."¹⁴

A significant aspect of the Fifth Circuit's recent decree that, by implication, this court has adopted, deserves explicit recognition. The *Jefferson County* decree orders school officials, "without delay," to take appropriate measures for the protection of Negro students who exercise a choice from "harassment, intimidation, threats, hostile words or acts, and similar behavior." Counsel for the school boards assured us in oral argument that relations between the races are good in these counties, and that no incidents would occur. Nevertheless, the fear of incidents may well intimidate Negroes who might otherwise elect to attend a "white" school.¹⁵ To minimize this fear school

¹⁴ See Section IX of the decree issued in *United States v. Jefferson County Bd. of Educ.*, F.2d, (5th Cir., Mar. 29, 1967) (en banc) providing for detailed reports to the district courts.

¹⁵ Various factors, some subtle and some not so subtle, operate effectively to maintain the status quo and keep Negro children in "their" schools. Some of these factors are listed in the recent report issued by the U.S. Commission on Civil Rights:

"Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved; for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro com-

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officials must demonstrate unequivocally that protection will be provided. It is the duty of the school boards actively to oversee the process, to publicize its policy in all segments of the population and to enlist the cooperation of police and other community agencies.¹⁶

The plaintiffs vigorously assert that the adoption of the Board's free choice plan in Charles City County, without further action toward equalization of facilities, will not cure present gross inequities characterizing the dual school system. A glaring example is the assignment of 135 commercial students to one teacher in the Negro school in contrast to the assignment of 45 commercial students per teacher in the white school and 36 in the Indian school. In the *Jefferson County* decree, the Fifth Circuit directs its attention to such matters and explicitly orders school officials to take "prompt steps" to correct such inequalities. School authorities, who hold responsibility for administration, are not allowed to sit back complacently and expect unorganized pupils or parents to effect a cure for these shockingly discriminatory conditions. The decree provides:

"Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the

munity has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation."

U.S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES—1965-66, at 51 (1966). In addition to the above enumeration, a report of the Office of Education has pointed out that Negro children in the high school grades refrain from choosing to transfer because of reluctance to assume additional risks close to graduation. Coleman & Campbell, *Equality of Educational Opportunity* (U.S. Office of Education, 1966). See also *Hearings Before the Special Subcommittee on Civil Rights of the House Committee on the Judiciary*, 89th Cong., 2d Sess., ser. 23 (1966).

¹⁶ HEW Reg. A, 45 C.F.R. § 181.17(c) (Supp. 1966).

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extent feasible, be *distributed evenly* between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, * * * such school shall be *closed* as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice.”¹⁷

II. *Faculty*

Defendants unabashedly argue that they cannot be compelled to take any affirmative action in reassigning teachers, despite the fact that teachers are hired to teach in the *system*, not in a particular school. They assert categorically that “they are not required under the Constitution to desegregate the faculty.” This is in the teeth of *Bradley v. School Bd. of Richmond*, 382 U.S. 103 (1965).

Having made this declaration, they say that they have nevertheless submitted a plan which does provide for faculty desegregation, but circumspectly they add that “it will require time and patience.” They protest that they have done all that could possibly be demanded of them by providing a plan which would permit “a constructive beginning.” This argument lacks appeal an eighth of a century after *Brown*.¹⁸ Children too young for the first grade at

¹⁷ F.2d at (en banc). (Emphasis supplied.)

¹⁸ “The rule has become: the later the start the shorter the time allowed for transition.” *Lockett v. Bd. of Educ. of Muscogee County*, 342 F.2d 225, 228 (5th Cir. 1965). See *Rogers v. Paul*, 382 U.S. 198, 199 (1965); *Bradley v. School Bd. of Richmond*, 382 U.S. 103 (1965); *Griffin v. County School Bd.*, 377 U.S. 218, 229 (1964); *Watson v. City of Memphis*, 373 U.S. 526, 530 (1963).

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the time of that decision are beyond high school age by now. Yet their entire school experience, like that of their elder brothers and sisters, parents and grandparents, has been one of total segregation. They have attended only a "Negro" school with an all Negro staff and an all Negro student body. If their studies encompassed *Brown v. Bd. of Educ.* they must surely have concluded sadly that "the law of the land" is singularly ineffective as to them.

The plans of both counties grandly profess that the pattern of staff assignment "will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools." No specific steps are set out, however, by which the boards mean to integrate faculties. It cannot escape notice that the plans provide only for assignments of "new personnel in a manner that will *work towards* the desegregation of faculties." As for teachers presently employed by the systems, they will be "allowed" (in Charles City County, the plan reads "allowed and encouraged") to accept transfers to schools in which the majority of the faculty members are of the opposite race. We are told that heretofore an average of only 2.6 new white teachers have been employed annually in New Kent County. Thus the plan would lead to desegregation only by slow attrition. There is no excuse for thus protracting the corrective process. School authorities may not abdicate their plain duty in this fashion. The plans filed in these cases leave it to the *teachers*, rather than the Board, to "disestablish dual, racially segregated school systems" and to establish "a unitary, non-racial system." This the law does not permit.

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As the Fifth Circuit has put it, "school authorities have an *affirmative duty* to break up the historical pattern of segregated faculties, the hallmark of the dual system."¹⁹

"[U]ntil school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system."²⁰

In contrast to the frail and irresolute plans submitted by the appellees, the Fifth Circuit has ordered school officials within its jurisdiction not only to make *initial* assignments on a non-discriminatory basis, but also to *reassign* staff members "to eliminate *past* discriminatory patterns."

For this reason, I wholeheartedly endorse the majority's remand for the inclusion of an *objective* timetable to facilitate evaluation of the progress of school authorities in desegregating their faculties. I also join the majority in calling upon the District Court to fashion a specific and comprehensive order requiring the boards to take firm steps to achieve *substantial* desegregation of the faculties. At this late date a desegregation plan containing only an indefinite pious statement of future good intentions does not merit judicial approval.

¹⁹ F.2d at

²⁰ United States v. Jefferson County Bd. of Educ., F.2d (5th Cir. 1966), *adopted en banc*, F.2d (5th Cir. Mar. 29, 1967). This thought has been similarly expressed in *Bradley v. School Bd. of City of Richmond*, 345 F.2d 310, 323 (4th Cir. 1965) (concurring opinion):

"It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated." (Emphasis in the original.)

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I must disagree with the prevailing opinion, however, where it states that the record is insufficiently developed to order the school systems to take further steps at this stage. No legally acceptable justification appears, or is even faintly intimated, for not immediately integrating the faculties. The court underestimates the clarity and force of the facts in the present record, particularly with respect to New Kent County, where there are only two schools, with identical programs of instruction, and each with a staff of 26 teachers. The situation presented in the records before us is so patently wrong that it cries out for immediate remedial action, not an inquest to discover what is obvious and undisputed.

It is time for this circuit to speak plainly to its district courts and tell them to require the school boards to get on with their task—no longer avoidable or deferrable—to integrate their faculties. In *Kier v. County School Bd. of Augusta County*, 249 F. Supp. 239, 247 (W.D. Va., 1966), Judge Michie, in ordering complete desegregation by the following years of the staffs of the schools in question, required that “the percentage of Negro teachers in each school in the system should approximate the percentage of the Negro teachers in the entire system” for the previous year. See *Dowell v. School Bd.*, 244 F. Supp. 971, 977-78 (W.D. Okla. 1965), *aff’d*, 35 U.S.L. WEEK 2484 (10th Cir., Jan. 23, 1967), *cert. denied*, 35 U.S.L. WEEK 3418 (U.S. May 29, 1967). While this may not be the precise formula appropriate for the present cases, it does indicate the attitude that district courts may be expected to take if this court speaks with clarity and firmness.

*Concurring Opinion of Judges Sobeloff and Winter*III. *The Briggs v. Elliott Dictum*

The defendants persist in their view that it is constitutionally permissible for *parents* to make a choice and assign their children; that courts have no role to play where segregation is not actively *enforced*. They say that *Brown* only proscribes enforced segregation, and does not command action to undo existing consequences of earlier enforced segregation, repeating the facile formula of *Briggs v. Elliott*.²¹

The court's opinion recognizes that "it is the duty of the school boards to eliminate the discrimination which inheres" in a system of segregated schools where the "initial assignments are both involuntary and dictated by racial criteria," but seems to think the system under consideration today "a very different thing." I fail to perceive any basis for a distinction. Certainly the two counties with which we are here concerned, like the West of Virginia, historically had *de jure* segregation of public education, so that by the court's own definition, the boards are under a duty "to eliminate the discrimination which inheres" in such a system. Whether or not the schools now permit "freedom of choice," the segregated conditions initially created *by law* are still perpetuated by relying primarily on Negro pupils "to extricate themselves from the segregation which has long been firmly established and resolutely maintained * * * ." ²² "[T]hose who operate the schools formerly segre-

²¹ "Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination." 132 F. Supp. 776, 777 (E.D.S.C. 1955).

²² *Bradley v. School Bd. of City of Richmond*, 345 F.2d 310, 322 (4th Cir. 1965) (concurring opinion).

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gated by law, and not those who attend, are responsible for school desegregation.”²³

It is worth recalling the circumstances that gave birth to the *Briggs v. Elliott* dictum—it is no more that dictum. A three-judge district court over which Judge Parker presided had denied relief to South Carolina Negro pupils and when this decision came before the Supreme Court as part of the group of cases reviewed in *Brown v. Bd. of Educ.*, the Court overruled the three-judge court and issued its mandate to admit the complaining pupils to public schools “on a racially non-discriminatory basis with all deliberate speed.” Reassembling the three-judge panel, Judge Parker understook to put his gloss upon the Supreme Court’s decision and coined the famous saying.²⁴ This catchy apothegm immediately became the refuge of defenders of the segregation system, and it has been quoted uncritically to eviscerate the Supreme Court’s mandate.²⁵

²³ Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 45 (1967).

See *Dowell v. School Bd.*, 244 F. Supp. 971, 975, 981 (W.D. Okla. 1965), *aff’d*, 35 U.S.L. WEEK 2484 (10th Cir. Jan. 23, 1967), *cert. denied*, 35 U.S.L. WEEK 3418 (U.S. May 29, 1967):

“The Board maintains that it has no affirmative duty to adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. But a school system does not remain static, and the failure to adopt an affirmative policy is itself a policy, adherence to which, at least in this case, has slowed up—in some cases—reversed the desegregation process.

. . .

The duty to disestablish segregation is clear in situations such as Oklahoma City, where such school segregation policies were in force and their effects have not been corrected.” (Emphasis supplied.)

²⁴ See n.21, *supra*.

²⁵ Judge Wisdom, in the course of a penetrating criticism of the *Briggs* decision, says:

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Having a deep respect for Judge Parker's capacity to discern the lessons of experience and his high fidelity to duty and judicial discipline, it is unnecessary for me to speculate how long he would have adhered to his view, or when he would have abandoned the dictum as unworkable and inherently contradictory.²⁶ In any event, the dictum cannot withstand the authority of the Supreme Court or survive its exposition of the spirit of the *Brown* holding, as elaborated in *Bradley v. School Bd.*, 382 U.S. 103 (1965); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963); *Cooper v. Aaron*, 358 U.S. 1 (1958).

"Briggs overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools or a school system with uncorrected effects of segregation.

Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and the organized undoing of the effects of past segregation.

The central vice in a formerly de jure segregated public school system is apartheid by dual zoning * * *. Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes. * * * [T]he overriding right of Negroes as a class [is] to a completely integrated public education."

F.2d at, (Emphasis supplied.)

²⁶ Shortly after pronouncing his dictum, in another school case Judge Parker nevertheless recognized that children cannot enroll themselves and that the duty of enrolling them and operating schools in accordance with law rests upon the officials and cannot be shifted to the pupils or their parents. *Carson v. Warlick*, 238 F.2d 724, 728 (1956).

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Anything that some courts may have said in discussing the obligation of school officials to overcome the effects of *de facto* residential segregation, caused by private acts and not imposed by law, is certainly not applicable here. Ours is the only circuit dealing with school segregation resulting from past legal compulsion that still adheres to the *Briggs* dictum.

"The Fourth is apparently the only circuit of the three that continues to cling to the doctrine of *Briggs v. Elliott* and embraces freedom of choice as a final answer to school desegregation in the absence of intimidation and harrassment."²⁷

We should move out from under the incubus of the *Briggs v. Elliott* dictum and take our stand beside the Fifth and the Eighth Circuits.

²⁷ Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 72 (1967). See *United States v. Jefferson County Bd. of Educ.*, _____ F.2d _____ (5th Cir., Mar. 29, 1967) (en banc); *Singleton v. Jackson Munic. Separate School Dist.*, 348 F.2d 729, 730 n.5 (5th Cir. 1965) ("[T]he second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well known dictum . . . in *Briggs v. Elliott* . . . should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights."); *Kemp v. Beasley*, 352 F.2d 14, 21 (8th Cir. 1965) ("The dictum in *Briggs* has not been followed or adopted by this Circuit and it is logically inconsistent with Brown and subsequent decisional law on this subject.")

Cf. *Evans v. Ennis*, 281 F.2d 385, 389 (3d Cir. 1960), cert. denied, 364 U.S. 933 (1961): "The Supreme Court has unqualifiedly declared integration to be their constitutional right." (Emphasis supplied.)

**Judgment of United States Court of Appeals
For the Fourth Circuit**

No. 10,792

Charles C. Green, Carroll A. Green and Robert C. Green,
infants, by Calvin C. Green and Mary O. Green,
their father and mother and next friends,
and all others of the plaintiffs,
Appellants,

versus

County School Board of New Kent County, Virginia, et al.,
Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond, for further proceedings consistent with the opinion of the Court filed herein; and that each side bear its own costs on appeal.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

Filed: June 12, 1967
Maurice S. Dean, Clerk

SUPREME COURT U. S.

No. 695

FILED
NOV 28 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

CHARLES C. GREEN, ET AL.,

Petitioners,

v.

COUNTY SCHOOL BOARD OF NEW KENT

COUNTY, VIRGINIA, ET AL.,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

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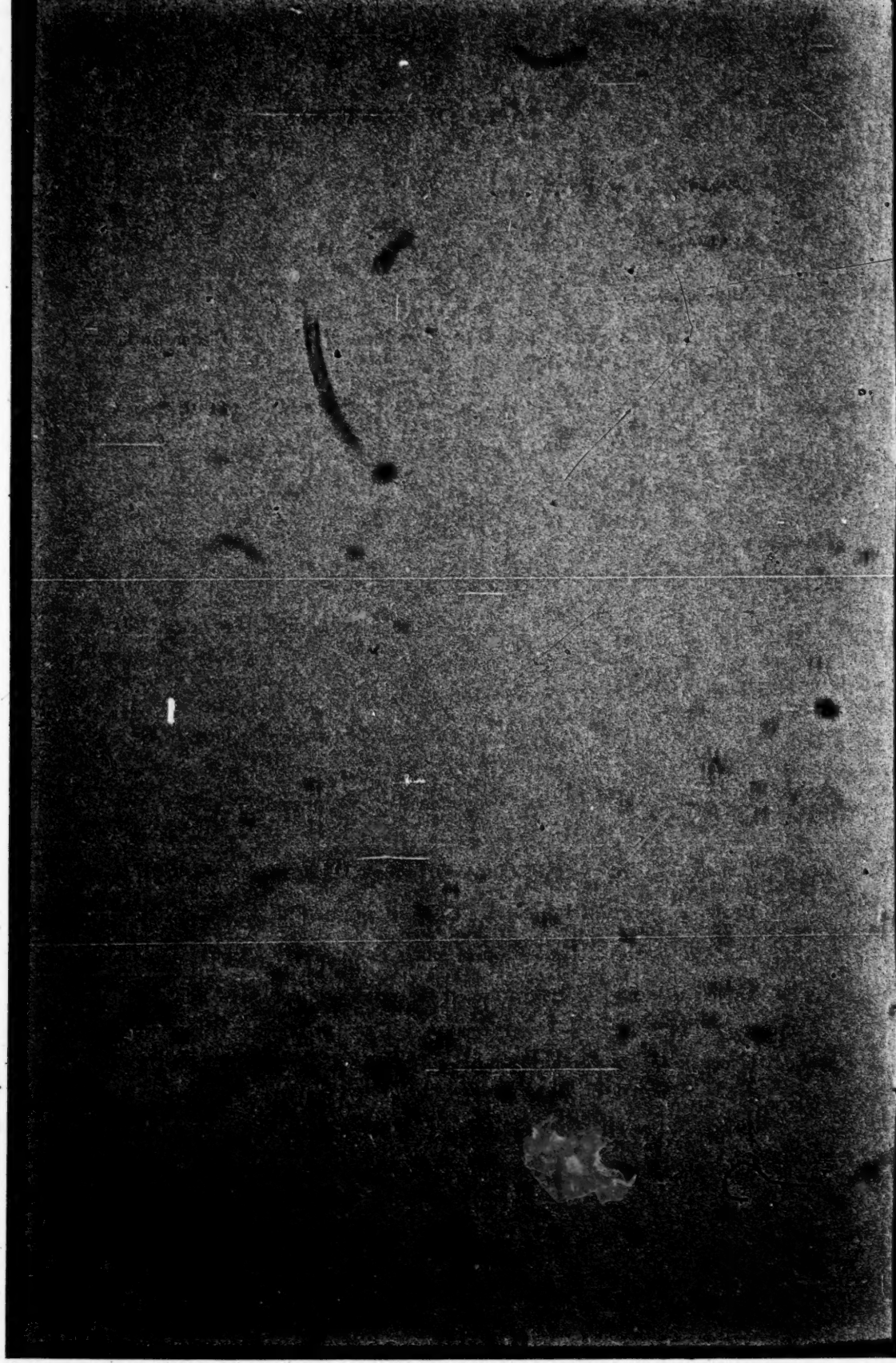


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**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

QUESTION PRESENTED

Does a local school board offend the constitutional right of any of the petitioners when it administers its schools under a plan of operation by which each pupil, including each petitioner, each year attends the school of his choice and the petitioners admit that their annual right is unrestricted and unencumbered?

STATEMENT

On July 15, 1966 the United States District Court for the Eastern District of Virginia approved plans for the operation of the public schools in New Kent County, Virginia and Charles City County, Virginia. The Court of Appeals for the Fourth Circuit in *Bowman v. School Board of Charles City County, Virginia, No. 10793* and *Green v. School Board of New Kent County, Virginia, No. 10792*, reviewed the "freedom of choice" provisions of the two plans as they relate to pupil assignment and said

"Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination."

As to the faculty provisions of the plan the Court said

"Appropriately, the School Board's plan included provisions for desegregation of the faculties. Supplemented at the direction of the District Court, those provisions are set forth in the margin.

"These the District Court found acceptable under our decision in *Wheeler v. Durham City Board of Education*, 363 F. 2d 738, but retained jurisdiction to entertain applications for further relief. It acted upon a record which showed that white teachers had been assigned to the 'Indian school' and one Negro teacher had been assigned to a formerly all white school.

"The appellants' complaint is that the plan is insufficiently specific in the absence of an immediate requirement of substantial interracial assignment of all teachers.

"On this record, we are unable to say what impact such an order might have upon the school system or what administrative difficulties might be encountered

in complying with it. Elimination of discrimination in the employment and assignment of teachers and administrative employees can be no longer deferred, but involuntary reassignment of teachers to achieve racial blending of faculties in each school is not a present requirement on the kind of record before us. Clearly, the District Court's retention of jurisdiction was for the purpose of swift judicial appraisal of the practical consequences of the School Board's plan and of the objective criteria by which its performance of its declared purposes could be measured.

"An appeal having been taken, we lack the more current information which the District Court, upon application to it, could have commanded. Without such information, an order of remand, the inevitable result of this appeal, must be less explicit than the District Court's order, with the benefit of such information, might have been.

"While the District Court's approval of the plan with its retention of jurisdiction may have been quite acceptable when entered, we think any subsequent order, in light of the appellants' complaints should incorporate some minimal, objective time table.

"Quite recently, a panel of the Fifth Circuit Court of Appeals has required some progress in faculty integration for the school year 1967-68. By that decree, school boards are required to take affirmative steps to accomplish substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year and, wherever possible, to assign more than one member of the minority race to each desegregated faculty. As much should be required here. Indeed, since there was an earlier start in this case, the District Court, with the benefit of current information, should find it appropriate to fashion an order which is much more specific and more comprehensive. What is done on remand, however, must be done upon a supplemented record after an appraisal of the practical,

administrative and other problems, if any, remaining to be solved and overcome.

Remanded."

We respectfully submit that the Fourth Circuit's action was proper and, as the Court specifically noted, the remand of the case coupled with the District Court's retention of jurisdiction would have permitted the District Court to move expeditiously to determine what steps should be taken with respect to faculty and whether the freedom of choice plans were being administered in a proper manner. The remand would have permitted the record to be properly assembled and brought up to date rather than have the petitioners seek to bring to this Court statements and records not a part of the record below.

Thus, we submit, the only relevant facts before this court are the plans adopted by the school board which plans are set forth in the Appendix to the Petition pages 4a through 11a.

ARGUMENT

I

The Constitutionality of Freedom of Choice Plans Under the Brown Decisions

The petitioners apparently are having some difficulty finding their footing as they seek to establish the principle that a state or locality offends the constitutional right of someone if it provides that, "under a so-called freedom of choice plan of desegregation, students are given a privilege rarely enjoyed in the past—the opportunity to attend the school of their choice." (Petition, p. 13). Would it not be strange if the Constitution of the United States denies this

privilege? Prior to *Brown* it was denied in many areas. It was to establish just such right that *Brown* was brought and it was to fix just such right that *Brown* was decided.

Petitioners recognize difficulty in complaining of such privilege and thus seek on page 12 of the Petition to limit their attack so as not to urge the *per se* unconstitutionality of such plans but the operational unconstitutionality. It is at this juncture, we submit, that they concede the validity of the action of the District Court in approving the plan with the retention of jurisdiction in order that the operation of the plan could be observed and they also concede the wisdom of the Court of Appeals in remanding the case for the District Court to review and update the record and fashion proper remedial decrees.

The difficulty encountered by the petitioners is that while in Charles City and New Kent Counties a geographical plan of school zoning might result in a student body composition satisfactory to the advocates of compulsory integration a similar plan might not accomplish their goal in a different geographical context—thus in Hopewell, Virginia and Gary, Indiana they were not content with geographical plans.

It becomes apparent then that the sole point presented by the petition is whether or not the *Brown* decisions require compulsory integration in schools, although as a preliminary question one might inquire who it is that is aggrieved by the freedom of choice plan since each petitioner is free to choose—what petitioner is denied what constitutional right?

Unless the “freedom of choice” principle approved in *Bradley v. School Board of the City of Richmond*, 345 F. 2d 310, vacated and remanded on other grounds 382 U.S. 103 (1965) is now to be declared invalid the admission of the petitioners that there exists an “unrestricted choice” would

seem to bring the case squarely within the language of *Bradley*.

"A system of free transfers is an acceptable device for achieving legal desegregation of schools."

The Court of Appeals for the Fourth Circuit speaking further in *Bradley* said:

"It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. . . . There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous. . . . There is no hint (in *Brown*) of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal rights of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend."

"Imposed discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic basis. . . . The other means (in addition to geographic zoning) of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and,

administratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils."

Under the freedom of choice plan involved here a 15 day choice period is provided, all activities of the schools are covered, transportation is without regard to race and no person may be subjected to penalty or favor because of the choice made.

No real attack was made upon the operation of the plan in the courts below. The only attack made was upon the principle of free choice. The movement which began to free the Negro from the inability to exercise a choice because of race would now—for purely racial motives—deny him the choice. The Petitioners say in effect there can be no free choice—there must be intermixture. The desire of parents must fall before the desire of those who would require "immediate total desegregation."

In spite of the fact that every Petitioner in this law suit admits the existence of an "unrestricted choice" they would have the Court *force* others to do what they are *free* to do already.

It is difficult to envision this as a bona fide action if the parents are merely asking the Court to do for others that which they can do by a mere application to the School Board. This argument flies in the teeth of the very type relief which was originally asked in the school cases. For example, it was argued before this Court in the District of Columbia case on April 11, 1955:

"Now, it would seem to me that this also could be of assistance to the Court in dealing with the question if, in a situation where the Court has as wide a supervisory power as in this, the Court directed the courts

below here to enter a decree which is in effect, Mr. Justice Frankfurter, this judgment reversed and cause remanded to the District Court for proceedings not inconsistent with this Court's opinion, and entry of a decree containing the following provisions:

"(1) All provisions of District of Columbia Code or other legislative enactments, rules or regulations, requiring, directing or permitting defendants to administer public schools in the District of Columbia on the basis of race or color, or denying the admission of petitioners or other Negroes similarly situated to the schools of their choice within the limits set by normal geographic school districting on the basis of race or color are unconstitutional and of no force or effect;

"(2) Defendants, their agents, employees, servants and all other persons acting under their direction and supervision, are forthwith ordered to cease imposing distinctions based on race or color in the administration of the public schools of the District of Columbia; and are directed that each child eligible for public school attendance in the District of Columbia be admitted to the school of his choice not later than September, 1955, within the limits set by normal geographic school districting;

"(3) The District Court is to retain jurisdiction to make whatever further orders it deems appropriate to carry out the foregoing;"*

We shall point out later herein that the Court embodied that free choice principle in its whole reasoning.

In *Brown v. Board of Education*, 347 U.S. 483 after holding that there is doubt that the Fourteenth Amendment was intended to apply to public education at all but that

* See Page 75, Vol. I Transcript in Supreme Court of the United States, April 11, 1955, *Bolling v. Sharpe*, 347 U.S. 497.

under today's conditions it must be applied, the Court reached the heart of its reasoning:

"In *Sweatt v. Painter* (U.S.) supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 94 L. ed. 1149, 70 S. Ct. 851, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

"Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this

finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."

So it was legally enforced segregation which the Court struck down—not *freedom of choice*. Indeed the Court answers our question vividly in the fourth of five questions which it had propounded for counsel to reargue. It asked for still further argument on question 4 which was:

"4 Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be *admitted to schools of their choice*, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?" (Emphasis added)

Clearly all that concerned the Court was shall *free choice* be granted *now* or can there be a *gradual adjustment*—? Gradual adjustment to what? A school with racial balance? No!—"to a system not based on color distinctions." Indeed the Court invited freedom of choice by the very nature of the relief it was considering.

When one considers that the Court had difficulty determining that the 14th Amendment forbade compulsory segregation—it is hard to understand how the Petitioners so easily find that it forbids free choice!

In attempting to understand the law as it has developed in public school field, it is important to define the term "segregation" and the term "desegregation." Petitioners use

the term "segregation" as though it means any situation in which all pupils in a particular school are of one race. They apparently contend that even so defined segregation is unconstitutional. If that be true it is unconstitutional for Colonial Heights, Virginia, to engage in public education at all for its entire population is white. Obviously then, a wholly white or a wholly colored school does not necessarily violate the Constitution. The missing ingredient is someone who is denied admission—someone who is *discriminated* against. Thus we come to the meaning of the term just as Webster defines it.

In Webster's New Collegiate Dictionary the terms *segregate* and *segregation* are defined as follows:

segregate—Set apart; separate; select. To separate or cut off from others or from the general mass; to isolate; seclude.

segregation—Act of segregating or state of being segregated; separation from a general mass or main body; specif., isolation or seclusion of a particular group of persons.

We submit that when the State stops acting, segregation no longer exists: for segregation is the result of action—a setting apart, separation or selection.

Desegregate is defined in that same work as follows:

desegregate—To free (itself) of any law, provision, or practice requiring isolation of the members of a particular race in separate units, esp. in military service or in education.

Under that definition our schools are desegregated!

On remand to the District Court the original *Brown* case resulted in the following statement by that Court:

"Desegregation does not mean that there must be an intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color." 139 Fed. Supp. 470)

Surely freedom of choice is constitutionally acceptable.

II

The Decisions of the Various Circuits Do Not Require Action by This Court

Having reviewed the decision of the Court of Appeals for the Fourth Circuit we would point out that the decisions of other Circuits are not inconsistent.

In *Clark v. Board of Education of Little Rock*, 369 F. 2d 661 rehearing denied 374 F. 2d 569 (1967) the Court of Appeals for the Eighth Circuit reached the same conclusion. The Tenth Circuit in *Downs v. Board of Education of Kansas City*, 336 F. 2d 988 (1964) cert. den. 380 U.S. 914 held that "although the Fourteenth Amendment prohibits segregation, it does not command integration of the races * * *" So, too, with the First Circuit in *Springfield School Committee v. Barksdale*, 348 F. 2d 261 (1965) and the Seventh Circuit in *Bell v. School, etc., City of Gary*, 324 F. 2d 209, (1963) cert. den. 377 U.S. 924 (1964).

The decision of the Fifth Circuit in *Jefferson County Board of Education*, 372 F. 2d 836 (1966) is not in conflict. There the decision was based upon local resistance and the Court admitted that it had not had to deal with "non-racially motivated de facto segregation." Clearly that decision would not declare unconstitutional a *fairly administered* freedom of choice plan.

CONCLUSION

We respectfully submit that the record racial unrest which has swept this country dictates that the proper course of action in these cases is to permit or require the States and localities to shape and operate non-discriminatory plans under the guidance of the District Court. It certainly does not indicate that a concept should be outlawed which is gaining orderly acceptance, is totally non-discriminatory, is resulting in markedly increased integration and is giving "a privilege rarely enjoyed in the past—the opportunity to attend the school of their choice." (Petition, p. 13.) {

Respectfully submitted,

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IN THE

FEB 14 1968

Supreme Court of the United States

JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

No. 695

CHARLES C. GREEN, *et al.*,

Petitioners,

—v.—

COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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IN THE
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OCTOBER TERM, 1967

No. 695

CHARLES C. GREEN, *et al.*,

Petitioners,

—v.—

COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

Citations to Opinions Below

The District Court filed memorandum opinions on May 17, 1966 and June 28, 1966. Both, unreported, are reprinted appendix at pp. 47-48a and 53-61a. The June 12, 1967 Court of Appeals opinions, reprinted appendix pp. 63-89a, are reported at 382 F. 2d 326 and 338.

Jurisdiction

The judgment of the Court of Appeals was entered June 12, 1967, appendix p. 90a. Mr. Justice Black, on September 8, 1967, extended time for filing the petition for

writ of certiorari until October 10, 1967 (91a). The petition for certiorari was filed October 9, 1967 and was granted December 11, 1967 (92a). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Question Presented

Whether—13 years after *Brown v. Board of Education*—a school board discharges its obligation to conduct a unitary non-racial school system, by adopting a freedom of choice desegregation plan, where the evidence shows that such plan is not likely to disestablish the dual system and where there are other methods, no more difficult to administer, which would immediately produce substantial desegregation.

Constitutional Provision Involved

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

Statement

Petitioners seek review of the constitutional adequacy of a freedom of choice desegregation plan adopted by defendant School Board and approved by the Court below *en banc*, Judges Sobeloff and Winter disagreeing with the majority opinion.

I. The Pleadings

Petitioners, Negro parents and children of New Kent County, Virginia, filed on March 15, 1965, in the United States District Court for the Eastern District of Virginia,

a class action seeking injunctive relief against the maintenance of separate schools for the races. The complaint named as defendants the County School Board, its individual members, and the Superintendent of Schools.¹

The defendants filed, on April 5, 1965, a Motion to Dismiss the complaint on the sole ground that it failed to state a claim upon which relief could be granted (13a). In an order entered on May 5, 1965, the district court deferred ruling on the motion and directed the defendants to file an answer by June 1, 1965 (14a). Defendants answered asserting that plaintiffs were permitted under existing policy (the pupil placement law) to attend the school of their choice without regard to race, subject only to limitations of space and denied that the court had jurisdiction to grant any of the relief prayed (21-22a).

Thereafter, to comply with Title VI of the Civil Rights Act of 1964, 78 Stat. 241, and regulations of the United States Department of Health, Education and Welfare, the New Kent County School Board, on August 2, 1965, adopted a freedom of choice desegregation plan (to be placed into effect in the 1966-67 school year) and on May 10, 1966 filed copies thereof with the District Court.

¹ The action was filed pursuant to 28 U. S. C. §1331 and §1343, and 42 U. S. C. §1981 and §1983. The complaint alleged that (7-8a):

Notwithstanding the holding and admonitions in *Brown v. Board of Education*, 347 U. S. 483 (1954) and 349 U. S. 294 (1955), the defendant school board maintains and operates a biracial school system. . . .

[that the defendants] ha[d] not devoted efforts toward initiating non-segregation in the public school system, [and had failed to make] a reasonable start to effectuate a transition to a racially non-discriminatory school system as under paramount law it [was] their duty to do.

II. The Plan Adopted by the Board

The plan provides essentially for "permissive transfers" for 10 of the 12 grades. Only students eligible to enter grades one and eight are required to exercise a choice of schools. It provides further that "any student in grades other than grades one and eight for whom a choice is not obtained will be assigned to the school he is now attending."² It states that no choice will be denied other than for overcrowding in which case students living nearest the school chosen will be given preference (34-40a).

By failing to require, at least in its initial year, that every student make a choice, the plan permits some students to be assigned under the former dual assignment system until approximately 1973. Under the plan students entering other than grades one or eight who do not exercise a choice are assigned to the school they are then attending. Thus, a student, who began school in fall, 1965, one year before the plan went into effect and was therefore assigned to a school previously maintained for his race would, unless he affirmatively exercised a choice to go elsewhere, be reassigned there for the remainder of his elementary school years. Similarly, students who entered high school prior to 1966-67 under the old dual assignment system, would, unless they took affirmative action to transfer elsewhere, be reassigned to that school until graduation. The plan, then, permits some students (those who began at a school before it went into effect) to be reassigned for as long as up to seven years (in the case of a first grader) to schools to which they originally had been assigned on the basis of race. It need hardly be said that such a plan—one which fails immediately to abolish continued racial assignments or reassignments—may not stand under *Brown v. Board of Education*, 347 U. S. 483 and 349 U. S. 294. The Fifth Circuit has rejected plans having that effect. See *United States v. Jefferson County Board of Education*, 372 F. 2d 836, 890-891, *aff'd with modifications on rehearing en banc*, 380 F. 2d 385, *cert. denied* sub nom. *Caddo Parish School Board v. United States*, 389 U. S. 840, 19 L. Ed. 2d 103. We point this out only to fully describe the workings of the plan. For overturning the decision below on this ground would be insufficient to protect petitioners' rights. As we more fully develop later what is objectionable about this plan is its employment of free choice assignment provisions to perpetuate segregation in an area, where, because of the lack of residential segregation, it could not otherwise result.

III. The Evidence

New Kent is a rural county in Eastern Virginia, east of the City of Richmond. There is no residential segregation; both races are diffused generally throughout the county³ (cf. PX "A" and "B"; see also the opinion of Judge Sobeloff at pp. 72a, 23a).⁴ There are only two public schools in the county: New Kent, the formerly all-white combined elementary and high school, and George W. Watkins, an all-Negro combined elementary and high school.

*Students:*⁵ During the 1964-1965 school year some 1291 students (approximately 739 Negroes, 552 whites) were enrolled in the school system. There were no attendance zones. Each school served the entire county. Eleven Negro buses canvassed the entire county to deliver 710 of the 740 Negro pupils to Watkins, located in the western half of the county. Ten buses transported almost all of the 550 white pupils to New Kent in the eastern half (see PX "A" and "B" and 24a, no. 4).

As the following table⁶ indicates, the Negro school was more overcrowded and had a substantially higher pupil-teacher ratio, and larger class sizes than the white school:

³ The Census reports show that the Negro population was substantially the same in each of the four magisterial districts in New Kent County: Black Creek—479, Cumberland—637, St. Peters—633, and Weir Creek—565. See U. S. Bureau of the Census. *U. S. Census of Population: 1960 General Population Characteristics, Virginia*. Final Report PC(1)-48B.

⁴ The prefix "PX" refers to plaintiffs' exhibits. Exhibits "A" and "B" show the bus routes for each of the two county schools. Because of the difficulty in doing so, they have not been reproduced in the appendix. Each exhibit shows the routes travelled by the various buses bringing children to that particular school. Each school is served by buses that traverse all areas of the county.

⁵ The information that follows was obtained from defendants' answers to plaintiffs' interrogatories (23-33a).

⁶ The data was compiled from 23-33a, in particular nos. 1-c, 1-f, 1-g, and 4.

Name of School	Pupil- Teacher Ratio	Average Class Size	Overcrowding Variance From Capacity (Elem. Grades	Number Buses	Average Pupils Per Bus
New Kent (white) 1-12 -----	22	21	+ 37 (9%)	10	54.8
George W. Watkins (Negro) 1-12 ----	28	26	+ 118 (28%)	11	64.5

From 1956 through the 1965-66 school year, school assignments of New Kent pupils were governed by the Virginia Pupil Placement Act, §22-232.1 *et seq.* Code of Virginia, 1950 (1964 Replacement Volume), repealed by Acts of Assembly, 1966, c. 590, under which any pupil could request assignment to any school in the county; children making no request were assigned to the school previously maintained for their race.⁷ The free choice plan the Board adopted in August, 1965 was not placed into effect until the 1966-1967 school year by which time it had been approved by the district court.

Despite their rights under the pupil placement procedure, up to and including the 1964-1965 school year no Negro pupil ever sought admission to New Kent and no white

⁷ Section 22-232.20 provided in part:

"... any child who wishes to attend a school other than the school which he attended the previous year shall not be eligible for placement in a particular school unless application is made therefor ..."

Section 22-232.6 provided:

"After December 29, 1956, each school child who has heretofore attended a public school and who has not moved from the county, city or town in which he resided while attending such school shall attend the same school which he last attended until graduation therefrom unless enrolled for good cause shown, in a different school by the Pupil Placement Board."

pupil ever sought admission to Watkins (25a, no. 7). Although, as the following table shows, some Negro students have since chosen to attend New Kent, no white pupil has ever attended Watkins:

YEAR	STUDENT BODY BY RACE ⁸					
	NEW KENT			WATKINS		
	White	Negro	Other	White	Negro	Other
1964-65	552	0	0	0	739	0
1965-66	555	35	0	0	691	0
1966-67	517	111	0	0	628	0
1967-68	519	115	10	0	621	0

Thus, as late as 13 years after the decision in *Brown*, 85% of the Negro students in the county attend school only with other Negroes.

Faculty: Teachers' contracts are for one year only. Until the 1966-67 school year, the Board adhered to a policy of assigning only white teachers to New Kent and only Negro teachers to Watkins. Despite the declarations of the Board, its policy has remained essentially unchanged as the following table shows:

	FACULTY COMPOSITION BY RACE ⁹			
	NEW KENT		WATKINS	
	White	Negro	White	Negro
1964-65	26	0	0	26
1965-66	26	0	0	27
1966-67	28.4	.4	0	27
1967-68	28	.2	1	29.8

⁸ The record in this case, like the records in all school desegregation cases, is necessarily stale by the time it reaches this Court. In this case the 1964-65 school year was the last year for which the record supplied desegregation statistics. Information regarding student and faculty desegregation during the 1965-66, 1966-67 and 1967-68 school years was obtained from official documents, available for public inspection, maintained by the United States Department of Health, Education and Welfare. Certified copies thereof and an accompanying affidavit have been filed with this Court and served upon opposing counsel.

⁹ This information is taken from the HEW documents referred to in Note 8, *supra*, and from number 1-f on 24a. Principals, librarians and other non-teaching personnel are not included.

In sum, during the current year, 1967-68, faculty integration consists of the assignment of one full-time white (of a total of 30.8 teachers) to Watkins and one part-time (the equivalent of one day each week) Negro teacher to New Kent. All the full-time teachers at that school are still white.

IV. The District Court's Decision

On May 4, 1966, the case was tried before the District Judge, Hon. John D. Butzner, Jr., who, on May 17, 1966, entered a memorandum opinion and order: (a) denying defendants' motion to dismiss, and (b) deferring approval of the plan pending the filing by the defendants of "an amendment to the plan [which would provide] for employment and assignment of staff on a non-racial basis" (47-49a).

The Board filed on June 6, 1966, a supplement to its plan dealing with school faculties (50a). On June 10, 1966, plaintiffs filed exceptions to the supplement contending (a) that the supplement failed to provide sufficiently for faculty and staff desegregation, and (b) that plaintiffs would continue to be denied constitutional rights under the freedom of choice plan and that the defendants should be required to assign students pursuant to geographic attendance areas (52a).

On June 28, 1966, the district court entered a memorandum opinion and an order approving the freedom of choice plan as amended (53-62a).

V. The Court of Appeals' Opinion

On appeal to the Court of Appeals for the Fourth Circuit petitioners contended that in view of the circum-

stances in the county, the freedom of choice plan adopted by the defendants was the method least likely to accomplish desegregation and that the district court erred in approving it.

On June 12, 1967, the Court, *en banc*, affirmed the district court's approval of the freedom of choice assignment provisions of the plan, but remanded the case for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal objective time table," some of the faculty provisions of the decree entered by the Fifth Circuit in *United States v. Jefferson County Board of Education*, *supra* (70-71a).

Judges Sobeloff and Winter concurred specially with respect to the remand on the teacher issue but disagreed on other aspects. Said Judge Sobeloff (71-72a):¹⁰

I think that the District Court should be directed not only to incorporate an objective time table in the School Board's plans for faculty desegregation, but also to set up procedures for periodically evaluating the effectiveness of the Boards' "freedom-of-choice" plans in the elimination of other features of a segregated school system.

.

... Since the Board's "Freedom-of-choice" plan has now been in effect for two years as to grades 1, 2, 8, 9, 10, 11 and 12 and one year as to all other grades,

¹⁰ This case was decided together with a companion case *Bowman v. County School Board of Charles City County, Virginia*, No. 10793, for which no review is sought. While the opinion discussed herein was rendered in the *Charles City* case, it was expressly made applicable to *New Kent* (64a); similarly Judge Sobeloff stated that his opinion in *Charles City* applied to *New Kent* (p. 71a). The opinion in the *Charles City* case is at 65-89a.

clearly this court's remand should embrace an order requiring an evaluation of the success of the plan's operation over that time span, not only as to faculty but as to pupil integration as well (73a).

While they did not hold, as petitioners had urged, that the peculiar conditions of the county made freedom of choice constitutionally unacceptable as a tool for desegregation they recognized that it was utilized to maintain segregation (76-77a):

As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, *the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning*—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, is *deliberately maintaining a segregated system which would vanish with non-racial geographic zoning*. The conditions in this county represent a classical case for this expedient. (Emphasis added.)

While the majority implied that freedom of choice was acceptable regardless of result, Judges Sobeloff and Winter stated the test thus (79a):

"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end.

SUMMARY OF ARGUMENT

Brown condemned not only compulsory racial assignments of public school children, but required "a transition to a racially non-discriminatory system." That goal is not achieved if some schools are still maintained or identifiable as being for Negroes and others for whites. It cannot be achieved until the racial identification of schools, consciously imposed by the state during the era of enforced segregation, has been erased. The specific direction in *Brown II* and general equitable principles require that school districts formerly segregated by law, employ affirmative action to achieve this end.

If the time for deliberate speed has indeed ended, as this Court has said (Note 38, *infra*), lower courts must now fashion decrees which, consistent with educational and equitable principles, will speedily and effectively disestablish the dual system thereby achieving the unitary non-racial system mandated by the Constitution. That was not done here.

Freedom of choice desegregation plans typically leave the dual system undisturbed. The overwhelming majority of school districts in *Brown*-affected states have adopted such plans (Note 18, *infra*) and available statistics demon-

strate that they have not disestablished the dual system (*infra*, pp. 26-27). At best, such plans leave one segment, the Negro segment, intact (*Ibid.*). Yet, most, but not all, lower courts have not responded to the obvious: such plans are not only wasteful and inefficient, but by nature are incapable of effectuating that transition.

Lengthy related experience under the Virginia Pupil Placement Law demonstrated that plans under which students assign themselves were not likely to disestablish the dual system in New Kent County. Petitioners, moreover, furnished uncontradicted evidence that another method, more feasible to administer would immediately disestablish the dual system. Nonetheless, the Board failed to offer any reasons justifying delay in achieving a unitary non-racial system. There was no suggestion that administrative difficulties would preclude the division of the county into two school attendance areas or the assignment of elementary school pupils to one school and high school students to the other.

Where alternative means of immediate accomplishment of a unitary non-racial school system are so readily available, judicial approval of free choice is constitutionally impermissible.

ARGUMENT

I.

Introduction

The question here is whether in the late sixties, a full generation of public school children after *Brown v. Board of Education*,¹¹ school boards may employ so-called freedom of choice desegregation plans which perpetuate racially identifiable schools, where other methods, equally or more feasible to administer, will more speedily disestablish the dual systems.

Other plans or programs, similarly ineffective where adopted, are under review in *Monroe v. Board of Commissioners of the City of Jackson, Tenn.*, No. 740, and *Raney v. The Board of Education of the Gould School District*, No. 805.¹² The controversies in all three cases concern the precise point at which a school board has fulfilled its obligations under *Brown*; and all three present for determination the question whether school districts formerly segregated by law must employ affirmative action to erase state-imposed racial identification of their schools.

The most marked and widespread innovation in school administration in southern and border states in the last fifty years has been the change in pupil assignment method in the years since *Brown*,¹³ from geographic attendance

¹¹ 347 U. S. 483 (*Brown I*); 349 U. S. 294 (*Brown II*).

¹² All three cases will be argued together. See 36 U. S. L. W. 3286 (U. S. Jan. 15, 1968).

¹³ See generally, Campbell, Cunningham and McPhee, *The Organization and Control of American Schools, 1965*. ("As a consequence of [*Brown v. Board of Education, supra*], the question of attendance areas has become one of the most significant issues in American education of this Century" (at 136).)

earliest landmark decisions construing the Fourteenth Amendment. Striking down a statute excluding Negroes from service on juries, the Court there observed (100 U.S. at 308):

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The *Brown* opinion merely returned to this authentic interpretation of the Amendment when it noted (approvingly quoting one of the lower courts, 347 U.S. at 494): "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."

The principle is not limited to situations in which the State teaches a philosophy of racial inferiority by expressly compelling segregation. The same message can be conveyed by lesser measures and they are equally forbidden. *E.g.*, *Lombard v. Louisiana*, 373 U.S. 267; *Robinson v. Florida*, 378 U.S. 153. Indeed, in some contexts, the Equal Protection Clause prohibits official action which merely facilitates, or gives effect to, private discrimination on the ground of race. *E.g.*,

Anderson v. Martin, 375 U.S. 399; *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151; *Shelley v. Kraemer*, 334 U.S. 1. And see *Reitman v. Mulkey*, 387 U.S. 369. The State cannot gratuitously take steps to make discrimination easy; the Fourteenth Amendment bars State action which unnecessarily creates opportunities for the play of private prejudice. So, here, we submit, the State authorities overstepped the constitutional line by adopting student assignment plans which predictably, if not designedly, cater to the preference of white students to avoid desegregated schools.

III

It remains to suggest the appropriate remedy in each of the cases before the Court. As we have noted, the central fact in all three school districts involved is that an overwhelming majority of the Negro student population still attend all-Negro schools because the prevailing "freedom-of-choice" or "free transfer" plans allow the white students who would otherwise attend those schools to assign themselves elsewhere. That result condemns the freedom-of-choice assignment system in each of the cases, in light of the availability of other more promising alternatives.

We need not particularize the details of an appropriate plan for each district. But it is apparent that in both New Kent, Virginia (No. 695) and Gould, Arkansas (No. 805), each of which have only two schools, a substantial degree of desegregation would be achieved if geographical zoning were adopted. And, of course, full desegregation would result if the two

schools in each district were "paired", one as the elementary school for the entire area, the other as the secondary school. Either solution is presumably sound educationally and nothing in the record suggests that either alternative presents special administrative problems.

The Jackson, Tennessee, situation (No. 740) is more complex, but the availability of alternate solutions is equally clear. In this district, geographic attendance zones are already in operation and the obvious first step therefore seems to be to eliminate the superimposed "free transfer" provision of the plan which has worked to preserve as all-Negro each of the formerly Negro elementary schools, the formerly Negro junior high school, and the formerly Negro high school. There remains, however, a challenge to the three junior high school zones as "gerrymandered."⁵

On the face of the record, the charge of gerrymandering is well founded. Indeed, it appears that substantially greater desegregation at the junior high school level would have resulted if the elementary zone lines had been followed to create a feeder system. No explanation was offered for the deviations from this traditional plan. Moreover, it is demonstrable that other alternative boundaries—with no apparent disadvantages—can be drawn to achieve still more desegregation in the three schools involved. Quite plainly, the school authorities made no effort in this direction. In our view, they should be directed—subject, of course, to the supervision of the district court—to

⁵ A challenge to the elementary school zones was sustained by the district court and is not in issue here.

redraw the junior high school zones with this purpose in view.

Respectfully submitted.

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FEBRUARY 1968.

IN THE

Supreme Court of the United States

October Term, 1967

No. 695

CHARLES C. GREEN, et al.,

Petitioners,

v.

**COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA, et al.,**

Respondents.

**MOTION AND BRIEF OF AMERICAN JEWISH
CONGRESS, AMICUS CURIAE**

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IN THE
Supreme Court of the United States

October Term, 1967

No. 695

CHARLES C. GREEN, *et al.*,

Petitioners,

v.

COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA, *et al.*,

Respondents.

**MOTION OF AMERICAN JEWISH CONGRESS
FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE***

The undersigned, as counsel for the American Jewish Congress, respectfully move this Court for leave to file the annexed brief as *amicus curiae*.

The American Jewish Congress is an organization of American Jews established in part to help secure and maintain equality of opportunity for Jews everywhere, and to safeguard the civil, political, economic and religious rights of Jews everywhere. It established its Commission on Law and Social Action in 1945, in part to fight every manifestation of racism and to promote the civil and political

equality of all minorities in America. The American Jewish Congress has expressed its long-standing concern with the evils of racial segregation in public schools in a number of ways, including the filing of briefs *amicus curiae* in this Court in *Brown v. Topeka*, 347 U. S. 483 (1954) and other cases.

Our concern here, however, stems primarily from what we regard as a threat to our constitutional system of government. This Court declared racial segregation in public schools unlawful in 1954. As we show in the annexed brief, that decision has not yet been translated into reality for more than a small fraction of the Negro children of the South. As a result, an increasing number of Americans are expressing doubt as to the effectiveness of judicial enforcement of constitutional guarantees.

Recent developments, including enactment of Title VI of the 1964 Civil Rights Act, 78 Stat. 241, 42 U. S. C. A. 2000d, give promise of more rapid movement toward effective integration. The chief danger that that movement will be frustrated lies in the widespread adoption of "integration" plans such as that involved here. If judicial approval is given to freedom of choice plans in areas where, because housing is integrated, geographic zoning would promptly and sufficiently achieve school integration, implementation of the *Brown* decision will be set back for at least another ten years.

The freedom of all Americans rests on our unique system of democratic constitutional guarantees. Nullification of any one of these guarantees threatens enforce-

ment of all the rest. We believe it is essential that no such nullification be permitted.

In the annexed brief, we urge that the decision below approving a freedom of choice plan for the New Kent school district rests on a too narrow concept of the remedial powers of the courts and of the needs of the immediate situation. We develop the argument that, in fields of law other than civil rights, the courts have recognized the necessity of undoing the effects of past illegal conduct even if this means barring measures that would otherwise be legal. We attempt to show that, because of the cumulative effects of 100 years of segregation and oppression, a freedom of choice plan in a school district such as New Kent necessarily means continuation of segregation and the inequality that results from segregation.

We have sought the consent of counsel for both parties to the filing of this brief. Counsel for petitioners consented but counsel for respondents withheld his consent.

Respectfully submitted,

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January 24, 1968

IN THE
Supreme Court of the United States

October Term, 1967

No. 695

CHARLES C. GREEN, *et al.*,

Petitioners,

v.

COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA, *et al.*,

Respondents.

**BRIEF OF AMERICAN JEWISH CONGRESS,
AMICUS CURIAE**

This brief is submitted with a motion for leave to file a brief *amicus curiae*. The interest of the American Jewish Congress is stated in the motion.

Statement of the Case

New Kent is a rural county in Virginia, in which there is no residential segregation. There are two public schools, New Kent and George W. Watkins, at opposite ends of the

county, both combining elementary and high school. Until the 1965-66 school year, every Negro pupil attended Watkins and every white pupil New Kent.

On March 15, 1965, petitioners, suing as Negro children and parents of children in the county, brought this class action in the United States District Court for the Eastern District of Virginia against the County School Board, its individual members, and the Superintendent of Schools, seeking injunctive relief against maintenance of separate schools for the races. When the suit was filed, assignment of students in New Kent County was governed by the Virginia Pupil Placement Act, Section 22.232.L, *et seq.*, Code of Virginia 1950 (1964 Replacement Volume), repealed by Acts of Assembly 1966, c. 590, under which each child was assigned to the school previously maintained for his race unless his parents took the initiative to request reassignment to another school in the county.

On August 2, 1965, after suit had been filed, the respondent School Board adopted a freedom of choice desegregation plan to be placed in effect in the 1966-67 school year (A. 34a). This new plan was adopted to meet the minimal requirements of Title VI of the Civil Rights Act of 1964, 78 Stat. 241, 42 USCA 2000d, as implemented by regulations of the United States Department of Health, Education and Welfare. It is this plan which is challenged herein on the ground that it does not involve sufficient affirmative action by local officials to remedy the effects of segregation formerly imposed upon the citizens of the county.

Under the present plan, students entering all grades except 1 and 8 are automatically, as under the prior plan,

assigned to the school they attended in the previous year unless they take the initiative in asking for a transfer. The only major change concerns grades 1 and 8. In those grades, pupils are required to specify which school they wish to attend. Thus, both Negroes and whites in those two grades must specify whether they wish to attend Watkins or New Kent. In 1966-67, the white children attended New Kent and 85% of the Negro children attended all-Negro Watkins (Petition for Writ of Certiorari, p. 6).

Petitioners argued that this plan is constitutionally unacceptable as a tool for desegregation under the particular facts of this case, especially since desegregated education could have been achieved simply and promptly by division of the county into two geographic attendance districts.

The District Court approved the plan, over petitioners' objection. The Fourth Circuit Court of Appeals, sitting *en banc*, affirmed, Judges Sobeloff and Winter dissenting. The case is here on writ of certiorari to the Fourth Circuit.

Question to Which This Brief is Addressed

This brief is addressed solely to the question whether the freedom of choice desegregation plan for the New Kent schools approved by the court below is constitutionally unsound because it fails to undo the effects of past unlawful racial segregation.

Summary of Argument

A. Racial segregation is still the prevailing pattern in Southern public school districts generally and in the New Kent District. This is due in large part to the fact that desegregation has been limited and grudging. No effect has been given to the concept that officials in formerly segregated school districts have an obligation to undo the effects of their past conduct and to make a fresh start.

B. Our legal system recognizes the necessity of framing remedial orders so as to undo the effects of past illegal conduct. Not only in cases affecting racial discrimination but also in such areas as anti-trust and patent law, the courts have acted to insure that their decrees eradicate the effects of past misconduct.

C. Continuing segregation in the New Kent schools, despite adoption of a freedom of choice plan, is the result of unremedied past illegal conduct. The plan adopted here looks only to the future and does not undo the accumulated results of past segregation.

In a school district such as New Kent, powerful community pressures are at work to inhibit Negro children and their parents from choosing the formerly all-white school. Indeed, it is likely that freedom of choice plans are supported by school officials in New Kent and elsewhere in the South because they expect such pressures to operate. It should not be necessary, as the court below required, to wait until there is proof of such pressure against specific parents in the district.

Aside from the matter of pressure, there is a factor of inertia on the part of Negro parents. A century of segregation, backed by oppression, has resulted in a deep-seated reluctance on the part of most Southern Negroes to demand changes for their benefit. This factor, also a result of past unconstitutional conduct, must not be allowed to play a part in shaping the public school system.

Finally, desegregation cannot be achieved under a freedom of choice plan unless a substantial number of white parents elect to send their children to the formerly Negro schools. That has not happened and is not likely to happen.

In view of these factors, the plan approved by the court below does not meet the requirements of this Court's decision in the school segregation cases.

ARGUMENT

The desegregation plan approved by the court below is constitutionally unacceptable because it fails to undo the effects of past discrimination.

A. Racial segregation is still the prevailing pattern in southern public school districts generally and in the New Kent district.

This Court's decisions of 1954 and 1955 in *Brown v. Topeka*, 347 U.S. 483, 349 U.S. 294, holding segregation in public schools unconstitutional have not yet been implemented. The relevant data are all too familiar.

The U.S. Commission on Civil Rights has recently reported that, according to the "highest estimates," no more

than one Negro child out of every 13 in the Deep South attended school with white children.¹ In 1964, only 2.25% of the Negro children in the 11 states of the Confederacy and 10.9% in the entire region encompassing the southern and border states attended schools with white children. Southern Educational Reporting Service, STATISTICAL SUMMARY 2, December 1965 at p. 29. Half of the bi-racial school districts in that area (1555 out of 3031) were still fully segregated. *Ibid.*

In Virginia, as of September, 1963, more than 98% of the Negro public school population attended all-Negro schools. Only 23 school districts out of the 55 which had both Negro and white pupils had begun to desegregate. PUBLIC EDUCATION, staff report submitted to the U.S. Commission on Civil Rights, p. 231 (1964).

The result of this continuing segregation is a denial of constitutional rights to millions of American children, injuring them in a manner not easily repaired. As this Court held in the *Brown* case (347 U.S. at 494):

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The great bulk of Negro children in the South and in the New Kent district are still suffering the effects of this separation.

1. U. S. Commission on Civil Rights, "Survey of School Desegregation in the Southern and Border States 1965-66," February 1966, p. 51 (hereinafter cited as "Survey").

Most of the continuing segregation is due, of course, to the simple refusal of southern school districts to make any move in compliance with *Brown* until compelled to do so by court action (or, since the 1964 Civil Rights Act, by the threat of the withholding of Federal funds under Title VI).² Much is due also to the fact that those steps that have been taken have been designed to maintain the *status quo* as far as possible. In most cases, all that has been touched has been the refusal of school officials to heed the demand of a specific parent for non-racial assignment of his children. The result has been to place on the segregated Negroes the burden of pressing for desegregation not only school district by school district but also child by child. Entirely rejected has been the concept that the school officials who have maintained segregated schools have the obligation to undo the effects of their past unconstitutional actions and to make a fair, fresh start.

The situation in Virginia and in the New Kent school district illustrates this point. Virginia's first response to the *Brown* decisions was its program of "Massive Resistance."³ When that collapsed, the state fell back on its Pupil Placement statute which gave state and local school authorities broad powers of school assignment. Acts of 1958, ch. 500, p. 638, as amended by Acts of 1959, Ex. Sess., 1959, ch. 71, p. 165. This statute was described as follows

2. The 1964 Staff Report cited *supra*, reporting on the status of integration efforts in selected counties in 17 states as of the end of the 1963-64 school year, reveals in detail the great effort that has been demanded to obtain constitutionally mandated desegregation. See particularly the section dealing with 13 counties in Virginia (pp. 231-277).

3. Muse, B., *Virginia's Massive Resistance* (U. Ind. Press, 1961).

by the U. S. Civil Rights Commission in its 1961 Report, Book 2, "Education," at p. 55:

"Massive resistance" to the *School Segregation Cases* is legally dead in Virginia, but its spirit lingers on. In 1959 the general assembly enacted a new program designed to limit desegregation and to permit white students to avoid attendance at schools enrolling Negroes. The spirit of the new approach was expressed by Governor J. Lindsay Almond, Jr., on January 28, 1959, in an address to the general assembly.

I pledged to the people of Virginia that I would resist with every source at my command that which I know to be wrong and would destroy every rational semblance of effective public education in Virginia. I have kept that pledge and you have kept it. Only those Virginians whose hearts are not in the fray give up in adversity. To be strong, a battle lost is but a challenge to redouble effort, energy, and devotion to scale the heights of worthy achievement.

Not surprisingly, no desegregation was achieved under this statute in the New Kent district and the schools were still wholly segregated when this proceeding was started (A. 25a).

The pupil assignment system, of course, was unconstitutional because it continued the procedure of assigning children to school on the basis of their race. However, the fact that a number of courts issued decisions to that effect⁴ did not affect operations in New Kent. The pupil assignment law continued to be applied in New Kent with continued complete segregation (A. 23a-24a, 25a). Presuma-

4. "Survey," *supra*, note 1, pp. 11-12.

bly, it would still be in effect but for the decrees issued in this proceeding.

In theory, the freedom of choice plan approved by the court eliminated the factor of race in this district. The school officials are no longer basing assignment of pupils or teachers to schools on the basis of race. The court's decision, however, ignores what everyone knows about how parents, Negro and white, act under these circumstances.

The vice of the decision below is that the court acted as though it was writing on a clean slate. It assumed that the formal act of telling parents that they may choose a school for their children established a non-racial school system. We submit that neither a board operating formerly segregated schools nor a reviewing court may ignore the known effects of prior segregation and discrimination—effects that render that assumption untenable.

B. Our legal system recognizes the necessity of framing remedial orders so as to undo the effects of past illegal conduct.

Our system of law recognizes that the courts have power to undo past conduct that has a continuing effect upon the situation before them. Indeed, the courts do not hesitate, in such cases, to require or forbid, for remedial purposes, a course of conduct that would not be required or forbidden by direct operation of the law.

After the National Labor Relations Act was adopted in 1935,⁵ the Labor Board frequently found situations in which the effects of past practices had to be undone. One typical

5. 49 Stat. 449 (1935).

fact situation showed a company union established by the employer prior to 1935. Employer support continued until the NLRA was held constitutional in 1937.⁶ Thereafter, employer support was reduced or terminated. Subsequently, a new union was started by the leaders of the old one but without employer assistance. In such cases, the Board held that the employer could not deal with the new union, even though it was established by legal procedures, because the continuing effects of the past practices had not been eliminated.

The courts upheld the Board in this matter without reservation. Thus, they accepted the theory that the Board could properly consider events prior to the effective date of the Act. See, e.g., *N.L.R.B. v. Newport News Co.*, 308 U. S. 241 (1939); *Western Union Tel. Co. v. N.L.R.B.*, 113 F.2d 992, 994 (C.A. 2, 1940). They held that the Labor Board could require "disestablishment" of unions created by employers even though all employer support had been withdrawn. This was viewed as "a means of eradicating the effects of past unfair labor practices" (*American Enka Corp. v. N.L.R.B.*, 119 F. 2d 60, 63 (C.A. 4, 1941)), thereby "wiping the slate clean and affording the employees an opportunity to start afresh. * * *" *Newport News case, supra*, 308 U. S. at 250. See also *N.L.R.B. v. Southern Bell T. & T. Co.*, 319 U. S. 50 (1943). The same considerations applied even where a new union had been formed to supplant the organization that had received employer support. *N.L.R.B. v. Youngstown Mines Corp.*, 123 F. 2d 178 (C.A. 8, 1941); *Sperry Gyroscope Co. v. N.L.R.B.*, 129 F. 2d 922

6. *N.L.R.B. v. Jones & Laughlin Corp.*, 301 U. S. 1, and companion cases.

(C.A. 2, 1942); *N.L.R.B. v. Rath Packing Co.*, 130 F. 2d 540 (C.A. 8, 1942).

Anti-trust law likewise suggests useful analogies. For example, in *International Salt Co. v. United States*, 332 U. S. 392 (1947), a company which had violated the anti-trust statutes urged that the corrective decree should merely invalidate the contracts that were found to be illegal. It asserted that it was "entitled to stand before the court in the same position as one who has never violated the law at all—that the injunction should go no further than the violation or threat of violation" (332 U. S. at 400). This Court said (*ibid.*):

* * * We cannot agree that the consequences of proved violations are so limited. The fact is established that the appellant already has wedged itself into this salt market by methods forbidden by law. The District Court is not obliged to assume, contrary to common experience, that a violator of the anti-trust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market.

Similarly, in *United States v. E. I. du Pont*, 353 U. S. 586 (1957), this Court traced the situation requiring correction back almost 50 years (353 U. S. at 598-599). In particular, it found that the du Pont company's acquisition of a substantial part of the General Motors stock in 1917 was subject to the drastic remedy of divestiture despite the absence of evidence of abuse of that position for 30 years. It expressly rejected the trial court's conclusion that "30 years of nonrestraint negated 'any reasonable probability

of such restraint' at the time of the suit" (at 598). It stressed that the courts have wide discretion in the shaping of remedial decrees (366 U. S. at 322). See also *United States v. E. I. du Pont*, 366 U. S. 316 (1961); *United States v. Crescent Amusement Co.*, 323 U. S. 173, 186 (1944).

Parallels can also be found in patent law, where effective elimination of the results of past misconduct is a matter of judicial concern. In *B. B. Chemical Co. v. Ellis*, 314 U. S. 495 (1942), this Court barred enforcement of a patent because the patentee had used it to foster an illegal monopoly. When the patentee urged that it had halted its illegal practices, the Court said (at 498): "It will be appropriate to consider petitioner's right to relief when it is able to show that it has fully abandoned its present method of restraining competition in the sale of unpatented articles *and that the consequences of that practice have been fully dissipated.*" (Emphasis supplied.)

These principles have frequently been applied in cases involving racial discrimination. For example, in *Guinn v. United States*, 238 U. S. 347 (1915), this Court considered an Oklahoma statute requiring literacy tests for all voters but providing an exemption for persons eligible to vote on January 1, 1866 and all lineal descendants of such persons. On that date, of course, Negroes were barred from voting. The bar was valid because the Fifteenth Amendment had not yet been adopted. The Court nevertheless held the statute unconstitutional. It found that the statute brought the standard of race into the voting process "since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the

controlling and dominant test of the right of suffrage" (at 364-5). It was enough that the right to vote was affected by race, even though the discrimination which had that effect had occurred half a century earlier and had been legal at that time. See also *Myers v. Anderson*, 238 U. S. 368 (1915); *Lane v. Wilson*, 307 U. S. 268 (1939).

In *Meredith v. Fair*, 305 F. 2d 343 (C.A. 5), cert. denied, 371 U. S. 828, (1962), a rejected Negro applicant to the University of Mississippi challenged a requirement that an applicant be sponsored by six University alumni on the ground that Negroes had theretofore been excluded from admission. The court held the requirement invalid. See also *Alabama v. United States*, 304 F. 2d 583, aff'd without opinion, 371 U. S. 37 (1962).⁷

In the following section, we seek to show that the freedom of choice plan approved by the court below fails to

7. The same approach has been taken by the New York State Commission for Human Rights, which administers the New York Law Against Discrimination, N. Y. Exec. Law, Secs. 290-301. In *Lefkowitz v. Farrell, et al.*, Case No. C-9287-63, decided Feb. 26, 1964, order enforced, *State Comm'n for Human Rights v. Farrell, et al.*, 43 Misc. 2d 958 (1964), it was charged and found that a union, which had maintained a policy of excluding Negroes up to and beyond enactment of the state fair employment law, favored applicants to an apprentice training program who were recommended by, and were usually relatives of, union members. The Commission found that this practice illegally discriminated against Negroes. It said (at p. 15):

It is no defense to say that selection based on family ties affects whites and non-whites alike, and therefore does not discriminate against Negroes specifically. * * * The fact that its practices may work against some white persons at some times does not alter the fact that they work against all Negro applicants at all times.

The Commission order prohibited the union from continuing to favor applicants recommended by union members.

meet the standards for remedial action established by the cases reviewed above.

- C. **The continuing segregation in the schools operated by the defendant school district, despite adoption of a freedom of choice plan, is the result of unremedied illegal segregation.**

The vice of adopting a freedom of choice plan in a school district such as that involved here is that it looks only to the future. It does not serve to undo the accumulated results of the practice of segregation. It does not make sure "that the consequences of that practice have been fully dissipated." *B. B. Chemical case, supra*. It assumes that mere use of the "free choice" formula means that the choice thereafter made by individual parents will in fact be free of any influence of past denials of constitutional rights. Common sense negates this assumption and experience destroys it.

(1) It is all too well known that the institution of racial segregation in the southern states has always depended ultimately on the threat of violence and economic pressure against those who challenge it.⁸ Hence, the fact that a school attendance plan that purports to depend on "freedom" is widely accepted in the formerly segregated states ("Survey," *supra*, note 1, p. 30) is inherently suspicious. The suspicion is no less valid in New Kent.

This is a county with almost no segregation in housing patterns and with two K-12 schools at the opposite ends of

8. See, for example, Myrdal, G., *An American Dilemma* (Harper, 20th Ann. Ed., 1962), pp. 555-569.

its area. It would have been a simple matter to have adopted the common practice of geographic zoning—establishing two attendance areas by drawing a line down the middle.⁹ It is therefore not unfair to say that the freedom of choice plan was probably found acceptable largely because it was assumed that those Negro families who presumed to send their children to previously white schools would be appropriately discouraged by extra-governmental forces.

But whether or not that was the conscious purpose of the plan, it is certainly the effect to be expected. There is ample evidence that efforts have in fact been made to dissuade Negro families from exercising their rights where freedom of choice plans have been adopted. See the section entitled, "Fear, Intimidation, and Harassment" in the U. S. Commission on Civil Rights "Survey" *supra*, pp. 35-42. The *New York Times* of January 12, 1968 reported that Harold Howe, 2d, United States Commissioner of Education, after noting that the gains in desegregation "must be described as minimal," has said.

It is a sorry thing to have to acknowledge that much of the desegregation that has taken place has occurred because thousands of Negro students and their parents

9. If it is argued that the school district is justified in rejecting geographic zoning because of the administrative difficulties it would cause and the possible inconvenience to the children who may be transferred from one school to the other, the simple answer is that neither the difficulties nor the inconvenience are substantial. Moreover, as this Court said in the second *du Pont* case (*United States v. E. I. du Pont*, 366 U. S. 316, 326 (1961)):

* * * But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests.

have been steadfast in the face of pressures of the cruelest sort.

The article reports that he listed these pressures as including "harassment and intimidation, threats of loss of jobs and evictions from homes and gunshots into dwellings of Negro school children."

The court below dealt with this aspect of the case by saying (A. 67a):

Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for "freedom of choice" is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them.

The court thus held, in effect, that court evidence of pressure in the school district would have to be produced.

We submit that this is an ostrich-like approach that is inconsistent with equitable remedial principles and facts of common knowledge. It ignores the reality of what the Negro parent in the previously segregated school district knows without daily reminder—that desegregation is opposed by the white community which dominates the political, economic and social structure of the state and locality, that it has been put into effect over that community's last-ditch opposition, that violence and oppression have been used for more than a century to punish those Negroes who attempt to assert their rights and that the white-controlled

government has never moved effectively to restrain those who resort to those measures. A century of such memories is not wiped out by a school district's coerced acceptance of a court decree.

This is particularly true of children attending public schools. The peculiar susceptibility to community pressure of such children was commented on in a different connection by Justice Frankfurter in his concurring opinion in *McCullum v. Board of Education of Champaign, Illinois*, 333 U. S. 203, 227 (1948):

* * * That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.

So here, although the child is "offered an alternative," there is "an obvious pressure" upon him not to challenge traditional practices. See also *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 351 (1910); *State ex rel. Weiss v. District Board*, 76 Wis. 177, 199-200 (1890); *Knowlton v. Baumhover*, 182 Iowa, 691, 699-700 (1918); *Kaplan v. Independent School District of Virginia*, 171 Minn., 142, 155-156 (1927) (dissenting opinion).

Under these circumstances, we submit, it was error for the court below to require that proof of actual pressure be submitted for "judicial appraisal." The exercise of pressure on the Negro parent to continue to accept segregation must be assumed. Some will resist the pressure but many, if not most, will not. This common sense conclusion is one

that the courts should reach without evidence of specific coercive measures.

When a defendant in a criminal case asserts that he cannot get a fair trial because an inflammatory atmosphere has arisen that will prevent jurors from bringing in an unpopular verdict, he is not required to show that particular jurors have been threatened. The courts make their decisions as to a change of venue or other corrective measures on the basis of the total atmosphere and their inference as to its likely effect. *Moore v. Dempsey*, 261 U. S. 86 (1923); *Sheppard v. Maxwell*, 384 U. S. 333, 362-3 (1966).

Here, as in the *International Salt* case, *supra*, the pressures may be "subtle" and "difficult to prove" but they may nevertheless be inferred. However, there is more than mere inference that strong community pressure is at work in this case. The Watkins school attended by Negroes is plainly inferior to the New Kent school, attended primarily by whites (A. 23a-24a). Moreover, for many Negroes, it stands at the opposite end of the county. Yet, only 15% of the Negro families have chosen to have their children go to the New Kent school. It is highly unlikely that this result would have been reached in a truly non-racial, free-choice system. If proof were needed of the existence and effectiveness of pressure, this figure would supply it.

(2) To whatever extent the failure of Negroes to apply for a change is due not to fear but to inertia, the respondent school board, as a state agency, must also be held responsible. One of the recognized results of the Jim Crow system so long maintained by the southern states was the fact that

Negroes were placed in a position of inferiority. The "equality" aspect of the Separate but Equal Doctrine was never more than pretense. Indeed, the segregation system was defended under the slogan of "white supremacy"—hardly a form of equality.

As this Court found in the *Brown* case, segregation of blacks by a society dominated by whites created a sense of inferiority in the segregated race. Throughout his life, and specifically in the segregated schools, the Negro was told that he was inferior and simultaneously prevented from taking any effective steps to assert his equality. The result, as many studies of the subject show, has been adoption by the Negro, particularly in the South, of a deep-seated reluctance to demand change.¹⁰ A population so trained by official suppression cannot be expected to opt for equality unanimously at the first opportunity. The government that segregated the Negroes in the first place has an obligation to take affirmative steps to undo the effects of its past wrongs. If it fails to do so, the courts have the power and responsibility to compel effective action.

It is no answer to say that some, perhaps even a majority, of the Negro families will choose integration. To whatever extent the factors described above cause some to remain segregated, the segregation is a carry-over from the original constitutional wrong.

10. Lewis, H., *The Blackways of Kent* (Coll. & Univ. Press, 1955), pp. 321-2; Silberman, C. E., *Crisis in Black and White* (Vintage Press, 1964), p. 200; Rose, A. M., *The Negro's Morale* (U. Minn., 1949), pp. 85-95; Pettigrew, T. F., *A Profile of the Negro American* (Van Nostrand, 1964), pp. 27-34.

(3) Assuming that the freedom of choice plan has operated in the New Kent schools without impairment by either undue pressure or inertia caused by past oppression, the fact remains that integration cannot be effective unless white children go to the Watkins school. Under a freedom of choice plan, that will not happen. Anyone familiar with the situation in the South knows that white parents will not make that choice. They have not done so at New Kent or, to any significant degree, in the many other districts that have adopted freedom of choice. "Survey," *supra*, note 1, at pp. 33-34. Realistic remedial action in this case therefore requires an attendance plan that does not rest on the factor of parental choice.

It is because of the factors discussed above that freedom of choice has come to be recognized as the most effective device for perpetuating racial segregation in public schools in areas having a high degree of residential integration. Affirmance of the decision below would grant school segregation in the South, presumably condemned 14 years ago, another reprieve in a series of reprieves that has already cast grave doubt on the effectiveness of our constitutional system.

The freedom of choice plan approved by the Circuit Court gives the Negro children in New Kent neither freedom nor equality. It therefore fails to comply with "the mandates of equality and liberty that bind officials everywhere." *Nixon v. Condon*, 286 U. S. 73, 88 (1932).

Conclusion

**We respectfully submit that the decision of the
Court of Appeals should be reversed.**

Respectfully submitted,

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January 24, 1968

IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 695

CHARLES C. GREEN, ET AL.,*Petitioners,*

v.

**COUNTY SCHOOL BOARD OF
NEW KENT COUNTY, VIRGINIA, ET AL.,***Respondents.***On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit**

BRIEF FOR THE RESPONDENTS

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IN THE
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**On Writ of Certiorari to the United States Court of
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BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Are the Negro patrons of a public school system denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution where the system is administered under a plan of operation by which each

pupil is given an unrestricted annual right to attend the school of his choice without regard to race, color or national origin?

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

The petitioners correctly state that, through the 1965-1966 school year, children in New Kent County attended school under the Pupil Placement Act of Virginia, and that there was no integration of the school system until 1965-1966 when 35 Negro children chose to attend the formerly all white school. Brief for Petitioners pp. 6-7.

However, an examination of the tables set forth on page 7 of their Brief will show that, in the year following implementation of the respondents' freedom of choice plan, the number of Negro children attending the formerly all white school more than tripled, and that progress has been made towards faculty desegregation.

The most recent statistics show that 115 of the 736 Negro students are attending New Kent, the formerly all white school, and that there is an enrollment of 644 in New Kent and 621 in Watkins, and 28.2 teachers in New Kent and 30.8 in Watkins.

The freedom of choice plan under which the New Kent County public school system is operated is set forth in the Appendix at pages 34a through 44a and pages 50a through 51a. In general, it gives each student in the system an unrestricted right to attend the school of his choice. It has been examined and approved by HEW, the District Court and the Court of Appeals *en banc*.

SUMMARY OF ARGUMENT

*Brown v. Board of Education of Topeka*¹ articulated a proscriptive constitutional mandate under the Fourteenth Amendment: No state shall deny to any child, solely because of race, admission to the public school of his choice. Compliance with the mandate required the elimination of state-imposed racial considerations so that those admitted to public schools were not Negro children and white children—but just children.

The petitioners themselves concede that they have an unrestricted choice and “a privilege rarely enjoyed in the past—the opportunity to attend the school of their choice.” (Pet. for Cert. p. 13.) Yet they ask to be deprived of a choice because the choice exercised by their fellow residents of the county—entirely free of state-imposed or promoted racial considerations—has not produced some sort of integrated balance of Negroes and whites in the school system.

That the states have no obligation under the Fourteenth Amendment to enforce compulsory integration of the races throughout the school system is recognized by decisions in the Courts of Appeal for the Fourth Circuit, the Sixth Circuit, the Seventh Circuit, the First Circuit, the Eighth Circuit and the Tenth Circuit and by the Congress of the United States. The same principle is implicit in decisions in the Courts of Appeal for the Third Circuit and the Second Circuit, respectively.

The respondents are aware that their public school system could be operated under some other plan. Their adoption of freedom of choice is rooted in both a constitutional base and an educational base. It is designed to honor the

¹347 U.S. 483 (1954), 349 U.S. 294 (1955) (hereinafter referred to as *Brown I* and *Brown II* or as the *Brown* decisions).

educational imperative of the system, as well as to comply with the Fourteenth Amendment, in the light of the circumstances in this rural Virginia county and the experiences in other areas with the withdrawal of white children from the public school system. Both the constitutional requirement and the educational function are fulfilled by the freedom of choice plan.

ARGUMENT

I.

Introduction

In their Complaint filed March 15, 1965, the petitioners alleged, in Article VI, paragraph 16 on page 8, that they "[S]uffer and will continue to suffer irreparable injury as a result of the persistent failure and refusal of the defendants to initiate desegregation and to adopt and implement a plan providing for the *elimination of racial discrimination in the public school system.*" (Emphasis added.) This was the basic premise of their Complaint and, significantly enough, it was reminiscent of the language in the *Brown* decisions.

On June 28, 1966, the District Court approved the respondents' freedom of choice plan for the operation of the New Kent County public school system. Under this plan each student in the county public school system, effective the 1966-67 term, was given the right to attend each year any school of his choice in the system.

The petitioners have acknowledged that under a free choice plan students are allowed to attend the school of their choice,² and have conceded that their right to make

²"[S]tudents are given a privilege rarely enjoyed in the past—the opportunity to attend the school of their choice." *Green v. County School Board of New Kent County*, Pet. for Cert. p. 13.

an annual choice is "unrestricted and unencumbered."³ This would seem to fulfill the petitioners' original premise; viz., elimination of racial discrimination by the respondents in their operation of the public school system.

However, the petitioners re-tooled their premise following the adoption of the freedom of choice plan by the respondents. It is now their premise that the respondents have a constitutional duty to compel Negro and white students alike, their free choices to the contrary notwithstanding, to attend schools on a racial basis in order to achieve an integrated system.

The re-tooled premise necessarily entails some difficulty for the petitioners, for it requires them to complain of the "privilege rarely enjoyed in the past—the opportunity to attend the school of their choice."⁴ Thus, on page 49 of their Brief, the petitioners acknowledge that a freedom of choice plan is not unconstitutional *per se*, but that it is unconstitutional in operation where "there is little reason to believe it will be successful"—an euphemistic expression for racial balance throughout the system.

It is at this juncture, we submit, that the petitioners concede the validity of the action of the District Court, which approved the plan with the retention of jurisdiction in order to observe its operation,⁵ and the action of the Court of Appeals, which remanded the case for the District Court to review and update the record and fashion proper decrees.

³*Bowman v. County School Board of Charles City County*, 382 F. 2d 326, 328 (4th Cir. 1967), the companion case, for which no review is sought, decided together with this case. While the opinion discussed herein was rendered in the *Charles City County* case, it was expressly made applicable to this case. *Green v. County School Board of New Kent County*, 382 F. 2d 338, 339 (4th Cir. 1967).

⁴Note 2, *supra*.

⁵Since the plan has been in operation, the number of Negro students attending the formerly all white school has grown from 35 in 1965-66 to 115 in 1967-68, according to the HEW Documents filed by the petitioners.

A fundamental rule established by the Supreme Court in school desegregation cases is that control over the course and shape of desegregation rests with the district courts and with the school boards themselves. The very nature of the problem points up the wisdom of the rule.

It was precisely for this reason that *Brown II* remanded the cases to the district courts. In subsequent cases the Supreme Court consistently has adhered to this rule, either expressly or in practice, and it was the basis of the remands in *Rogers v. Paul*, 382 U.S. 198 (1965), and *Bradley v. School Board of City of Richmond*, 382 U.S. 103 (1965). Yet the petitioners would have control transferred to this Court, despite the fact that the District Court unquestionably has the greater opportunity to observe the free choice plan in operation.

In the courts below, the thrust of the petitioners' attack was upon the principle of free choice rather than the operation of the plan. It is incongruous that the movement which began in order to free the Negro from the inability to exercise a choice because of race would now, for purely racial motives, deny him the choice. The petitioners say in effect that white and Negro alike should have no choice. There must be integration of the races in any event. The desire of parents and students must yield to the desire of those who would require compulsory integration.

Though the petitioners have conceded the existence of an unrestricted choice, they would have this Court *force* others to do what they are *free* to do already. This is dangerous in principle because it restores race as a criterion in the operation of the public schools, and it was this very criterion that was rejected in the *Brown* decisions. The criterion of race simply is improper under our governmental system.⁶

⁶"Our Constitution is colorblind." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Dissenting opinion).

The genius of the American political tradition, in its best sense, in relation to race is that it dictates that racial criteria are not legitimate in the operation of governmental facilities and should be rigorously eschewed. To bring racial criteria in by the front door, so to speak, even before throwing them out the back, represents, in my opinion, no real gain for the body politic and has potentially dangerous implications for the future.⁷

The petitioners' position also endangers the fundamental aim of the public school system. Clearly there is no redeeming value in integration compelled at the expense of education. This result would obtain, however, where the free choices of parents and pupils are frustrated. The following statement gives some perspective to the problem:

[T]he purpose of schools is education and . . . no child is being served if education is being made impossible. School authorities must make clear when they believe that pupils are being used as pawns in the struggles of adults. The question to be asked about all proposals is whether they will improve the education of the pupils involved, not whether they will contribute to other goals, even desegregation.⁸

Integration alone is not, therefore, a proper goal in terms of the educational imperative. The social engineering inherent in compelling students to attend certain schools on

⁷Gordon, *Assimilation in American Life: The Role of Race, Religion and National Origins*, p. 250 (1964). See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954): "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."

⁸*De Facto Segregation*, Educational Policies Commission of the NEA and the American Association of School Administrators, NEA Journal p. 36 (October 1965).

purely racial grounds and against their wishes has no place in education,⁹ and, it is submitted, no warrant in law.

II.

The validity of a plan permitting each pupil annually to attend the public school of his free choice is implicit in the mandate of *Brown v. Board of Education*

A. THE MANDATE OF *Brown v. Board of Education*

The seed of the petitioners' case is sown upon stony ground when they cite the *Brown* decisions for the proposition that the Fourteenth Amendment mandates compulsory integration of public schools. The petitioners construe these decisions to mean that the Fourteenth Amendment prohibits public schools which are segregated *from any cause*

⁹See Fischer, *Educational Problems of Segregation and Desegregation*, from *Education in Depressed Areas*, A. Harry Passow, editor, p. 290 (1963), in which the author commends "a maximum of free choice for all children" and criticizes the "growing pressure to locate schools, draw district lines, and organize curricula in order to achieve a pre-determined racial pattern or enrollment." *Id.* at 296-97.

A sufficient answer to the petitioners' complaint that a free choice plan is unreasonably burdensome and uneconomical to the school system is that these are not criteria under the Fourteenth Amendment. See *Kelley v. Altheimer, Arkansas Public School District*, 378 F. 2d 483, 497 (8th Cir. 1967) (discussing costly and inefficient bus systems). It is not conceded, moreover, that the geographic zone plan urged by the petitioners would be more economical and convenient to the system. The inevitable result of this, based upon the racial balance concept implicit in the petitioners' argument, would be to put the respondents in the zoning business—a diurnal haul indeed. See *Swann v. Charlotte-Mecklenburg Board of Education*, 369 F. 2d 29 (4th Cir. 1966), and *Deal v. Cincinnati Board of Education*, 369 F. 2d 55 (6th Cir. 1966), *cert. den.*, U.S., where the plaintiffs complained that the zones as drawn did not produce the "necessary" racial composition in the schools and argued that the Boards were required to re-zone or take other steps whenever necessary to achieve the proper racial composition in the schools. See also *Bradley v. School Board of City of Richmond*, 345 F. 2d 310 (4th Cir. 1965), *vacated and remanded on other grounds*, 382 U.S. 103.

whatsoever and requires the appropriate State authorities to compel integration.

This construction by the petitioners must yield to the unequivocal language of the Court itself:¹⁰

We come then to the question presented: Does segregation of children in public schools *solely on the basis of race*, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. (Emphasis added.)

To separate [Negroes] from others of similar age and qualifications *solely because of their race* generates a feeling of inferiority as to their status in the community. . . . (Emphasis added.)

[W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of *the segregation complained of*, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. (Emphasis added.)

The key to the meaning of *Brown I* lies in the italicized words, taken in context. The "segregation complained of," which was held to deny equal protection of the laws, was the refusal of the respondents, *solely on the basis of race*, to permit Negroes to attend the school of their choice. It was, therefore, legally enforced segregation, solely on the basis of race, which the Court struck down—not freedom of choice. In fact, Mr. Justice Marshall himself, during his argument at the bar of this Court on December 9, 1952, in Case No. 101, carefully pointed out that the harm suffered by the Negro children was the product of *state-imposed segregation*:

¹⁰347 U.S. at 493, 494 and 495 (*Brown I*).

But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children. . . .¹¹

That *Brown I* permits the respondents' freedom of choice plan is implicit in the fourth of five questions put to counsel to reargue in terms of the proper method of achieving desegregation:¹²

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be *admitted to schools of their choice*, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to *a system not based on color distinctions*? (Emphasis added.)

Clearly what concerned the Court was whether *free choice* shall be granted *now* or shall there be a *gradual adjustment*? Gradual adjustment to what? To schools with racial balance? No!—"to a system not based on color distinctions." A freedom of choice plan, in which there is an unrestricted and unencumbered right to attend any school in the system, is manifestly not based on color distinctions. The Court invited freedom of choice by the very nature

¹¹Ward & Paul, *Transcript of Brown v. Board of Education of Topeka* p. 28 (Library, U.S. Supreme Court). See Conant, *Slums and Suburbs* p. 27 *et seq.* (1961). The author suggests that the pupils in a completely Negro school are not by that fact alone deprived of equal educational opportunities if they are not assigned solely because of their race. *Id.* at 28.

¹²347 U.S. at 495, n. 13.

of the relief it was considering and, in addition, by its decision in *Brown II*. There the Court answered question 4(b) in the affirmative in remanding the cases to the district courts for such orders and decrees as might be required to admit the petitioners to public schools on a racially non-discriminatory basis. Moreover, it is not without significance that the Court couched its decision in terms of the admission, rather than the assignment, of students on a racially nondiscriminatory basis. A freedom of choice plan provides just such a basis in that the sole criterion for admission to any school is the individual's free choice and not his race.¹³

B. THE SHAPE AND MEANING OF THE *Brown v. Board of Education* MANDATE

1. In the United States Supreme Court

The mandate of the *Brown* decisions was stated in unequivocal terms in *Cooper v. Aaron*, 358 U.S. 1, 5, 7 (1958):

On May 17, 1954, this Court decided that *enforced racial segregation* in the public schools of a State is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. (Emphasis added.)

State authorities were thus duty bound to devote every effort toward *initiating desegregation* and bringing about the *elimination of racial discrimination* in the public school system. (Emphasis added.)

¹³Provided, of course, the choice will not result in overcrowding. In this case the plan properly provides that where a school would become overcrowded if all the choices were granted, pupils choosing that school will be assigned to the school of their choice nearest to their homes.

zones to so-called "free choice." Prior to *Brown*, systems in the north and south, with rare exception, assigned pupils by zone lines around each school.¹⁴

Under an attendance zone system, unless a transfer is granted for some special reason, students living in the zone of the school serving their grade would attend that school.

Prior to the relatively recent controversy concerning segregation in large urban systems, assignment by geographic attendance zones was viewed as the soundest method of pupil assignment. This was not without good reason; for placing children in the school nearest their home would often eliminate the need for transportation, encourage the use of schools as community centers and generally facilitate planning for expanding school populations.¹⁵

In states where separate systems were required by law, this method was implemented by drawing around each white school attendance zones for whites in the area, and around each Negro school zones for Negroes. In many

¹⁴ "In the days before the impact of the *Brown* decision began to be felt, pupils were assigned to the school (corresponding, of course to the color of the pupils' skin) nearest their homes; once the school zones and maps had been drawn up, nothing remained but to inform the community of the structure of the zone boundaries." *Ventres Moses v. Washington Parish School Board*, — F. Supp. — (slip op. 15-16) (E. D. La. 1967), discussed *infra*, p. 19. See also Meador, *The Constitution and the Assignment of Pupils to Public School*, 45 Va. L. Rev. 517 (1959), "until now the matter has been handled rather routinely almost everywhere by marking off geographical attendance areas for the various buildings. In the South, however, coupled with this method has been the factor of race."

¹⁵ Campbell, Cunningham and McPhee, *supra*, Note 13 at 133-144.

By showing that zone assignment was the norm prior to *Brown*, we intend merely to indicate the background against which free choice was developed. We do not suggest that the use of zones is always the most desirable method of pupil assignment.

areas, as in the case before the Court where the entire county was a zone, lines overlapped because there was no residential segregation. Thus, in most southern school districts, school assignment was largely a function of three factors: race, proximity and convenience.

After *Brown*, southern school boards were faced with the problem of "effectuating a transition to a racially non-discriminatory system" (*Brown II* at 301). The easiest method, administratively, was to convert the dual attendance zones into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience.¹⁶ With rare exception, however, southern school boards, when finally forced to begin desegregation, rejected this relatively simple method in favor of the complex and discriminatory procedures of pupil placement laws and, when those were invalidated,¹⁷ switched to what has in practice worked the same way—so-called free choice.¹⁸

¹⁶ Indeed, it was to this method that this Court alluded in *Brown II* when it stated "[t]o that end, the courts may consider problems related to administration, arising from . . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis" (349 U. S. at 300-301).

¹⁷ For cases invalidating or disapproving such laws, see *Northcross v. Board of Education of the City of Memphis*, 302 F. 2d 818 (6th Cir., 1962); *Gibson v. Board of Public Instruction of Dade County*, 272 F. 2d 763 (5th Cir., 1959); *Manning v. Board of Public Instruction of Hillsboro County*, 277 F. 2d 370 (5th Cir., 1960); *Dove v. Parham*, 282 F. 2d 256 (8th Cir., 1960).

¹⁸ According to the Civil Rights Commission, the vast majority of school districts in the south use freedom of choice plans. See *Southern School Desegregation, 1966-67*, A Report of the U. S. Commission on Civil Rights, July, 1967. The report states, at pp. 45-46:

Free choice plans are favored overwhelmingly by the 1,787 school districts desegregating under voluntary plans. All such

. In Virginia, the freedom of choice concept was resorted to after the state's "massive resistance"¹⁹ measures had failed.²⁰ The Pupil Placement Board, first created by legislation approved September 29, 1956²¹ placed no Negro child in any white school until after the June 28, 1960 decision in *Farley v. Turner*, 281 F. 2d 131 (4th Cir.). During the next two years, 1960-61 and 1961-62, that board conducted individual hearings in the cases of those Negro children and their families who, having protested against assignments to Negro schools and having had the fact of such

districts in Alabama, Mississippi, and South Carolina, without exception, and 83% of such districts in Georgia have adopted free choice plans. . . .

The great majority of districts under court order also are employing "freedom of choice."

See also *Survey of School Desegregation in the Southern and Border States, 1965-1966*, United States Commission on Civil Rights, February, 1966, at p. 47.

¹⁹ In *National Association for the Advancement of Colored People v. Patty*, 159 F. Supp. 503, 511, Judge Soper discusses the legislative history of the massive resistance program.

²⁰ The State statute requiring the closing of any public school wherein both white and Negro children might otherwise be enrolled was invalidated on January 19, 1959 in *Harrison v. Day*, 200 Va. 439, 106 S. E. 2d 636. See also, *James v. Almond*, 170 F. Supp. 331 (E. D. Va. 1959) (three-judge court); but not until after one or more schools had been closed in Norfolk (see *James v. Almond*, 170 F. Supp. 331) (E. D. Va. 1959), in Charlottesville (see *School Board of City of Charlottesville v. Allen*, 263 F. 2d 295 (4th Cir. 1959)) and in Warren County (see Governor's proclamation reported in 3 Race Rel. L. Rep. 972); and the threat of closed schools had effectively deterred desegregation in Arlington County (see *Hamm v. County School Board of Arlington County*, 264 F. 2d 945, 946 (4th Cir. 1960)).

²¹ Chapter 70, Acts of Assembly, 1956, Extra Session, codified as §22-232.1 *et seq.* of the Code of Virginia 1950, 1964 Repl. Vol. (repealed by Acts 1966, c. 590).

protest publicized in the local newspaper, were subjected to tests and other criteria not required of white children. The unconstitutionality of such discriminatory practices was declared in *Green v. School Board of the City of Roanoke*, 304 F. 2d 118 (4th Cir. 1962) and *Marsh v. County School Board of Roanoke County*, 305 F. 2d 94 (4th Cir. 1962). Thereafter,²² the timely applications for the assignment of Negro children to named schools attended by their white neighbors were routinely granted²³ except in a few communities where boundaries for school attendance zones have been drawn around racially segregated residential areas.²⁴

Under so-called free choice students are allowed to attend the school of their choice. Most often they are permitted to choose any school in the system. In some areas, they are permitted to choose only either the previously all-Negro or previously all-white school in a limited geographic area. Not only are such plans more difficult to administer (choice forms have to be processed and standards developed for passing on them, with provision for

²² See *United States v. County School Board of Prince George County, Va.*, 221 F. Supp. 93, 105 (E. D. Va. 1963), viz.: "The Pupil Placement Board suggested in oral argument that this suit is premature because recently the Board has adopted a policy of assigning Negro applicants to schools attended by white children without regard to academic achievement or residence requirements different from those required of white children." (Emphasis added.)

²³ See, e.g., *Pettaway v. County School Board of Surry County, Virginia*, 230 F. Supp. 480 (E. D. Va. 1964), modified and remanded, 339 F. 2d 486 (4th Cir.); *Franklin v. County School Board of Giles County, Virginia*, 242 F. Supp. 371 (W. D. Va. 1965) reversed 360 F. 2d 325 (4th Cir. 1966).

²⁴ See, e.g., *Gilliam v. School Board of the City of Hopewell, Virginia*, 345 F. 2d 325 (4th Cir. 1965), remanded 382 U. S. 103 (1965).

notice of the right to choose and for dealing with students who fail to exercise a choice),²⁵ they are, in addition,—as experience demonstrates (*infra* pp. 25-27)—far less likely to disestablish the dual system.

²⁵ Section II of the decree appended by the United States Court of Appeals for the Fifth Circuit, to its recent decision in *United States v. Jefferson County Board of Education*, 372 F. 2d 836, *aff'd with modification on rehearing en banc*, 380 F. 2d 385, *cert. denied sub nom. Caddo Parish School Board v. United States*, 389 U. S. 840, 19 L. Ed. 2d 103, shows the complexity of such plans. That Court had previously described such plans as a "haphazard basis" for the administration of schools. *Singleton v. Jackson Municipal Separate School District*, 355 F. 2d 865, 871, (5th Cir. 1966).

Under such plans generally, and under the plan in this case, school officials are required to mail (or deliver by way of the students) letters to the parents informing them of their rights to choose within a designated period, compile and analyze the forms returned, grant and deny choices, notify students of the action taken and assign students failing to choose to the schools nearest their homes. Virtually, each step of the procedure, from the initial letter to the assignment of students failing to choose, provides an opportunity for individuals hostile to desegregation to forestall its progress, either by deliberate mis-performance or non-performance. The Civil Rights Commission has reported on non-compliance by school authorities with their desegregation plans:

In Webster County, Mississippi, school officials assigned on a racial basis about 200 white and Negro students whose freedom of choice forms had not been returned to the school office, even though the desegregation plan stated that it was mandatory for parents to exercise a choice and that assignments would be based on that choice [footnote omitted]. In McCarty, Missouri after the school board had distributed freedom of choice forms and students had filled out and returned the forms, the board ignored them.

Survey of School Desegregation in the Southern and Border States, 1965-1966, at p. 47. Given the other shortcomings of free choice plans, there is serious doubt whether the constitutional duty to effect a non-racial system is satisfied by the promulgation of rules so susceptible of manipulation by hostile school officials. As Judge Sobeloff has observed:

A procedure which might well succeed under sympathetic administration could prove woefully inadequate in an antagonistic environment.

Bradley v. School Board of the City of Richmond, 345 F. 2d 310 (4th Cir. 1965) (concurring in part and dissenting in part).

Only recently a district court, in what has proved to be the most important judicial scrutiny of free choice plans, observed (*Moses v. Washington Parish School Board*, — F. Supp. — (E. D. La., October 19, 1967):

Free choice systems, as every southern school official knows, greatly complicate the task of pupil assignment in the system and add a tremendous workload to the already overburdened school officials (— F. Supp. —; Slip Op. 15).

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If this Court must pick a method of assigning students to schools within a particular school district, barring very unusual circumstances, we could imagine *no method more inappropriate, more unreasonable, more needlessly wasteful in every respect*, than the so-called "free-choice" system. (Emphasis added.) (*Id.* at 21).

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Under a "free-choice" system, the school board cannot know or estimate the number of students who will want to attend any school, or the identity of those who will eventually get their choice. Consequently, the board cannot make plans for the transportation of students to schools, plan curricula, or even plan such things as lunch allotments and schedules; moreover, since in no case except by purest coincidence will an appropriate distribution of students result, and each school will have either more or less than the number it is designed to efficiently handle, many students at the end of the free-choice period have to be reassigned to schools other than those of their choice—this time on a strict geographical-proximity basis, see the *Jeffer-*

son County decree, thus burdening the board, in the middle of what should be a period of firming up the system and making final adjustments, with the awesome task of determining which students will have to be transferred and which schools will receive them. Until that final task is completed, neither the board nor any of the students can be sure of which school they will be attending; and many students will in the end be denied the very "free choice" the system is supposed to provide them. (*Id.* at 21-22)

Although the court never explicitly answers its own question—why was the Washington Parish Board willing to undergo the uncertainty and unreasonable burdens imposed by such a system (*slip. op.* at 21-22)—it ordered the abandonment of free choice and, in its place the institution of a geographical zoning plan.²⁶

Under free choice plans, the extent of actual desegregation varies directly with the number of students seek-

²⁶ As we more fully develop *infra* pp. 23-25, we think the answer obvious: that the Washington Parish Board, and indeed most boards, adopted free choice knowing and intending that it would result in fewer Negro students in white schools and, conversely, fewer (if any at all) white students in Negro schools, than would otherwise result under a rational non-racial system of pupil assignment.

To be sure, a free choice plan might make some sense, as Judge Heebe recognized, in the context of grade by grade desegregation and where all grades in a given building had not yet been reached (*Id.* at 18-19). In such circumstances, it might indeed have been easier to assign by "choices" rather than have to draw new zones for each building each time a new grade level was reached under the plan. But, as Judge Heebe pointed out, "the usefulness of such plans logically ended with the end of the desegregation process [when the plan reached all grades]" (*Ibid.*).. Thus, even conceding some interim usefulness for free choice, in some other situation, it was entirely out of place in New Kent County which desegregated all grades at the time the plan was approved and which had but two schools.

ing, and actually being permitted to transfer to schools previously maintained for the other race. It should have been obvious, however, that white students—in view of general notions of Negro inferiority and that far too often Negro schools are vastly inferior to those furnished whites²⁷—would not transfer to formerly Negro schools; and, indeed, very few have.²⁸ Thus, from the beginning the burden of disestablishing the dual system under free choice was thrust upon the Negro children and their parents, despite this Court's admonition in *Brown II* (349 U. S. 294, 299) that "school authorities had the primary responsibility." That is what happened in this case. Although the majority stated that (66a):

The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents [and that] it is the duty

²⁷ Watkins, the Negro school in New Kent County was more overcrowded and had substantially larger class sizes and teacher-pupil ratios than did the white school. (See p. 6, *supra*.)

The Negro schools in the South compare unfavorably to white schools in other important respects. In *Equality of Educational Opportunity*, a report prepared by the Office of Education of the United States Department of Health Education and Welfare pursuant to the Civil Rights Act of 1964, the Commissioner states, concerning Negro schools in the Metropolitan South (at p. 206):

The average white attends a secondary school that, compared to the average Negro is more likely to have a gymnasium, a foreign language laboratory with sound equipment, a cafeteria, a physics laboratory, a room used only for typing instruction, an athletic field, a chemistry laboratory, a biology laboratory, at least three movie projectors.

Essentially the same was said of Negro schools in the non-metropolitan South (*Id.* at 210-211). It is not surprising, therefore, quite apart from race, that white students have unanimously refrained from choosing Negro schools.

²⁸ "During the past school year, as in previous years, white students rarely chose to attend Negro schools." *Southern School Desegregation, 1966-67* at p. 142, *United States v. Jefferson County Board of Education, supra*, 372 F. 2d at 889.

of the school boards to eliminate the discrimination which inheres in such a system [,]

the very plan the court approved did just that. To be sure each pupil was given the unrestricted right to attend any school in the system. But, as previously noticed, desegregation never occurs except by transfers by Negroes to the white schools. Thus, the freedom of choice plan approved below, like all other such plans, placed the burden of achieving a single system upon Negro citizens.

The fundamental premise of *Brown I* was that segregation in public education had very deep and long term effects. It was not surprising, therefore, that individuals reared in that system and schooled in the ways of subservience (by segregation, not only in schools, but in every other conceivable aspect of human existence) when asked to "make a choice," chose, by inaction, that their children remain in the Negro schools. In its *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964* (hereinafter referred to as *Revised Guidelines*), the Department of Health, Education and Welfare states (45 C.F.R. Part 181.54):

A free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, *the very nature of a free choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.* (Emphasis added.)

Beyond that, by making the Negro's exercise of choice the critical factor upon which the conversion depended, school

authorities virtually insured its failure. Every community pressure militates against the affirmative choice by Negro parents of white schools.²⁹ Moreover, intimidation of Negroes, a weapon well-known throughout the south, could equally be employed to deter them from seeking transfers to white schools. At best, school officials must have reasoned, only a few hardy souls would venture from the more comfortable atmosphere of the Negro school, with their all-Negro faculties and staff.³⁰ Those that "dared," would soon be taught their place.³¹

²⁹ Compare the following (M. Hayes Mizell, *The South Has Gen-
uinely and Held on to Tokenism*, Southern Education Report, Vol.
3, No. 6 (January/February, 1968), at p. 19):

Freedom of choice . . . has not brought significant school desegregation . . . simply because it is a policy which has proved too fragile to withstand the political and social forces of Southern life. The advocates of freedom of choice assumed that school desegregation would somehow be insulated from these forces while, in reality, it was central to them.

In embracing the freedom of choice plan Southern school systems understood, even if HEW did not, that man's choices are not made within a vacuum, but rather they are influenced by the sum of his history and culture.

³⁰ "Negro students who choose white schools are, as we know from many cases, only Negroes of exceptional initiative and fortitude." *United States v. Jefferson County Board of Education*, *supra*, 372 F. 2d at 889.

³¹ A good example is *Coppedge v. Franklin County Board of Education*, 273 F. Supp. 289 (E. D. N. C. 1967), appeal pending. The Court found that there was marked hostility to desegregation in Franklin County, that Negroes had been subjected to violence, intimidation and reprisals, and that each successive year under the freedom of choice plan it had approved earlier had resulted in fewer requests by Negroes for reassignment to formerly all-white schools. Concluding that (*Id.* at 296):

Community attitudes and pressures . . . have effectively inhibited the exercise of free choice of schools by Negro pupils and their parents

The Court directed that the defendants prepare and submit to the Court, on or before October 15th, 1967, a plan for the assignment, at the earliest practicable date,

Nor were they mistaken. The Civil Rights Commission, in its most recent reports on school desegregation in *Brown*-affected states, reports exhaustively of the violence, threats of violence and economic reprisals to which Negroes have been and are subjected to deter them from placing their children in white schools.³² That specific

of all students upon the basis of a unitary system of non-racial geographic attendance zones, or a plan for the consolidation of grades, or schools, or both (*Id.* at 299-300).

³² *Southern School Desegregation, 1966-67* at pp. 45-69; *Survey of School Desegregation in the Southern and Border States, 1965-66*, at pp. 55-56. To relate but a few of the numerous instances of intimidation upon which the Commission reported: the 1966-67 study quotes the parents of a 12 year old boy in Clay County, Mississippi as saying (at p. 48):

white folks told some colored to tell us that if the child went [to a white school] he wouldn't come back alive or wouldn't come back like he went.

In Edgecombe County, North Carolina, the home of a Negro couple whose son and daughter were attending the formerly all-white school was struck by gunfire (50). In Dooly County, Georgia, the father of a 14 year old boy, who had filled out his own form and attended the formerly white school, reported that "that Monday night the man [owner] came and said 'I want my damn house by Saturday'" (52).

The Commission made the following findings, in its 1966-67 report (at p. 88):

6. Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and Border States, require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:

(a) Fear of retaliation and hostility from the white community . . .

(b) [V]iolence, threats of violence and economic reprisal by white persons, [and the] harassment of Negro children by white classmates . . .

(c) [improper influence by public officials].

(footnote continued on following page)

episodes do not occur to particular individuals hardly prevents them from learning of them and acting on that knowledge.

With rare exception, then, school officials adopted, and the lower courts condoned, free choice knowing that it would produce fewer Negro students in white schools, and less injury to white sensibilities than under the geographic attendance zone method. Their expectations were justified. Meaningful desegregation has not resulted from the use of free choice. Even when Negroes have transferred, however, desegregation has been a one-way street—a few Negroes moving into the white schools, but no whites transferring to Negro schools. In most districts, therefore, as here, the vast majority of Negro pupils continue to attend school only with Negroes.

Although the proportion of Negroes in all-Negro schools has declined since *Brown*, more Negro children are now attending such schools than in 1954.³³ Indeed, during the 1966-67 school year, a full 12 years after *Brown*, more than 90% of the almost 3 million Negro pupils in the 11 Southern states still attended schools which were over 95% Negro and 83.1% were in schools which were 100% Negro.³⁴ And, in the case before the Court, 85% of the Negro pupils in New Kent County still attend schools with

(d) Poverty: . . . Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;

(e) Improvements . . . have been instituted in all-Negro schools . . . in a manner that tends to discourage Negroes from selecting white schools.

³³ *Southern School Desegregation, 1966-67*, at p. 8.

³⁴ *Id.* at 103.

only Negroes. "This June, the vast majority of Negro children in the South who entered the first grade in 1955, the year after the *Brown* decision, were graduated from high school without ever attending a single class with a single white student."³⁵ Thus, as the Fifth Circuit has said, "[f]or all but a handful of Negro members of the High School Class of 1966, this right [to equal educational opportunities with white children in a racially non-discriminatory public school system] has been 'of such stuff as dreams are made on.'"³⁶

In its most recent report, the Civil Rights Commission states (*Southern School Desegregation, 1966-67*, at p. 3):

... the slow pace of integration in the Southern and border states was attributable in large measure to the fact that most school districts in the South had adopted so-called "free choice plans" as the principal method of desegregation ...

The review of desegregation under freedom of choice plans contained in this report, and that presented in last year's Commission's survey of southern school desegregation, shows that *the freedom of choice plan is inadequate in the great majority of cases as an instrument for disestablishing a dual school system*. Such plans have not resulted in desegregation of Negro schools and therefore perpetuate one-half of the dual school system virtually intact (*Id.* at 94).

³⁵ *Id.* at 90-91.

³⁶ *United States v. Jefferson County Board of Education*, *supra*, 372 F. 2d 836 at 845.

Freedom of choice plans . . . [have] failed to disestablish the dual school systems in the Southern and border states . . . [*Id.* at 3].³⁷

II.

A Freedom of Choice Plan Is Constitutionally Unacceptable Where There Are Other Methods, No More Difficult to Administer, Which Would More Speedily Disestablish the Dual System.

The duty of a school board under *Brown*, in the late sixties is to adopt that plan which will most speedily accomplish the effective desegregation of the system. By now, the time for "deliberate speed" has long run out.³⁸ We concede that a court should not enforce its will where

³⁷ HEW has apparently reached the same conclusion. According to the Director of its Office of Civil Rights, F. Peter Libassi, "[freedom of choice] . . . often doesn't finish the job of eliminating the dual school system. We had to follow the freedom of choice plan to prove its ineffectiveness, and this was the year that it did prove its ineffectiveness, so that now we're ready to move into the next phase." *N. Y. Times*, Sept. 24, 1967, at p. 57. And, in the *Palm Beach Post-Times* of Oct. 8, 1967 at p. B-7, he was reported to have said, "you can't eliminate the dual system by free choice."

In an earlier report, *Racial Isolation in the Public Schools*, the Civil Rights Commission observed (at p. 69) that, ". . . the degree of school segregation in these free-choice systems remains high," and concluded that (*ibid.*): "only limited school desegregation has been achieved under free choice plans in Southern and Border city school systems."

³⁸ Almost two years ago this Court stated, "more than a decade has passed since we directed desegregation of public school facilities with all deliberate speed. . . . Delays in desegregating school systems are no longer tolerable." *Bradley v. School Board of The City of Richmond*, 382 U. S. 103, 105. "There has been entirely too much deliberation and not enough speed. . . ." *Griffin v. County School Board of Prince Edward County*, 377 U. S. 218, 229. "The time for more 'deliberate speed' has run out . . ." *Id.* at 234. Cf. *Watson v. Memphis*, 373 U. S. 526, 533.

alternative methods are not likely to produce dissimilar results—that much discretion should still be the province of the school board. We submit, however, that a court may not—at this late date, in the absence of persuasive evidence showing the need for delay—permit the use of any plan other than that which will most speedily and effectively disestablish the dual system. Put another way, at this point, that method must be mandated which will do the job more quickly and effectively.

A. The Obligation of a School Board Under *Brown v. Board of Education* Is to Disestablish the Dual School System and to Achieve a Unitary, Non-racial System.

1. The Fourth Circuit's Adherence to *Briggs*.

At bottom, this controversy concerns the precise point at which a school board has fulfilled its obligations under *Brown I and II*. When free choice plans initially were conceived, courts generally adhered—mistakenly, we submit—to the belief that it was sufficient to permit each student an unrestricted free choice of schools. It was said that “desegregation” did not mean “integration” and that the availability of a free choice of schools, unencumbered by violence and other restrictions, was sufficient quite apart from whether any integration actually resulted. (The doctrine probably had its genesis in the now famous dictum of Judge Parker in *Briggs v. Elliot*, 132 F. Supp. 776, 777 (E. D. S. C. 1955), “The Constitution . . . does not require integration. It merely forbids segregation.”³⁹). Despite

³⁹ See generally *Jeffers v. Whitley*, 309 F. 2d 621, 629 (4th Cir. 1962); *Borders v. Rippey*, 247 F. 2d 268, 271 (5th Cir. 1957); *Boson v. Rippey*, 285 F. 2d 48, 48 (5th Cir. 1960); *Vick v. Board of Education of Obion County*, 205 F. Supp. 436 (W. D. Tenn. 1962); *Kelley v. Board of Education of the City of Nashville*, 270 F. 2d 209, 229 (6th Cir. 1959).

its protestations, the majority below manifested much of this thinking (66-67a, 68a):

Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria [freedom of choice], is an illusion and an oppression which is constitutionally impermissible . . .

Employed as descriptive of a system in which each pupil, or his parents, must annually⁴⁰ exercise an uninhibited choice, and the choices govern the assignments, it is a very different thing.

.

Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination. [Emphasis added.]

At no point in its opinion did the majority meet the essence of petitioners' claim—that in view of related experience under the pupil placement law, there was no good reason to believe that free choice would, in fact, desegregate the system and that the district court should have mandated the use of geographic zones which, on the evidence before it, would produce greater desegregation. The opinion, in true *Briggs* form, neither states nor implies a requirement that the plan actually "work." The most it can be read to say is that while Negroes rightfully may complain if extraneous circumstances inhibit the making of a "truly

⁴⁰ Contrary to the court's statement, the plan did not require that "each pupil or his parents *must annually* exercise [a] choice." See Note 2, *supra*.

free choice," they have no basis to complain and the Constitution is satisfied if no such circumstances are shown.⁴¹

2. Brown Contemplated Complete Reorganization.

The notion that the making available of an ostensibly unrestricted choice satisfies the Constitution, quite apart from whether significant numbers of white students choose Negro schools or Negro students white schools, is fundamentally inconsistent with *Brown I* and *II*; *Bolling v. Sharpe*, 347 U. S. 497, *Cooper v. Aaron*, 358 U. S. 1, *Bradley v. School Board of the City of Richmond*, 382 U. S. 103 and other decisions of this Court.⁴² *Brown*, in our view, condemned not only compulsory racial assignments but also, more generally, the maintenance of a dual public school system based on race—where some schools are maintained or identifiable as being for Negroes and others for whites. It presupposed major reorganization of the educational systems in affected states. The direction in *Brown II*, to the district courts demonstrates the thorough-

⁴¹ This is not an overharsh reading of the opinion. Only recently a writer observed:

The Fourth is apparently the only circuit of the three that continues to cling to the doctrine of *Briggs v. Elliot*, and embraces freedom of choice as a final answer to school desegregation in the absence of intimidation and harassment.

See Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 Va. L. Rev. 42, 72 (1967). Judge Sobeloff perceived this and exhorted the majority to "move out from under the incubus of the *Briggs v. Elliot* dictum and take [a] stand beside the Fifth and Eighth Circuits" (89a). Cf. *Swann v. Charlotte-Mecklenburg Board of Education*, 369 F. 2d 29 (4th Cir. 1966) where essentially the same philosophy—that a desegregation plan need not result in actual integration—was expressed in a case involving geographic zones.

⁴² See *Rogers v. Paul*, 382 U. S. 198; *Calhoun v. Latimer*, 377 U. S. 263; *Griffin v. County School Board of Prince Edward County*, 377 U. S. 218; *Goss v. Board of Education*, 373 U. S. 68.

ness of the reorganization envisaged. They were held to consider:

problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems (349 U. S. at 300-301).⁴³

If a "racially non-discriminatory system" could be achieved with Negro and white students continuing as before to attend schools designated for their race, none of the quoted language was necessary. It would have been sufficient merely to say "compulsory racial assignments shall cease." But the Court did not stop there. It ordered, rather, a pervasive reorganization which would transform the system into one that was "unitary and non-racial," one, in other words, in which schools would no longer be identifiable as being for Negroes or whites.

That students have been permitted to choose a school does not destroy its racial identification if it previously was designated for one race, continues to serve students of, and is staffed solely by, teachers of that race. The only way the racial identification of a school—consciously imposed by the state during the era of enforced segregation—can be erased is by having it serve students of both races, through teachers of both races. Only when racial identification of schools has thus been eliminated will the dual system have been disestablished.

⁴³ Much the same was implied in *Cooper v. Aaron*, *supra*, at 358 U. S. 7: "state authorities were thus duty bound to devote every effort toward initiating desegregation . . ."

3. Case and Statutory Law.

Decisional and statutory⁴⁴ law support this reading of *Brown*. Only two—the Fourth and the Sixth⁴⁵—of the six

⁴⁴ Dissatisfied with the snail's pace of southern school desegregation (caused mainly by the early approval by the lower courts of pupil placement laws and, when they were invalidated as administered, by judicial acceptance of free choice), Congress enacted Titles IV (42 U. S. C. 2000-c et seq.) and VI (42 U. S. C. 2000-d et seq. (1964)) of the Civil Rights Act of 1964.

Pursuant to Title VI, the Department of Health, Education and Welfare adopted a series of "Guidelines," for school districts desegregating pursuant to *Brown*. In its most recent—the *Revised Guidelines*, dated December, 1966—the Department has taken the position that desegregation plans must work—result in actual integration. Under these *Guidelines*, the Commissioner has the power, where the results under a free choice plan continue to be unsatisfactory, to require, as a precondition to the making available of further federal funds, that the school system adopt a different type of desegregation plan. *Revised Guidelines*, 45 CFR 181.54. Although administrative regulations propounded under Title VI of the Civil Rights Act of 1964 are not binding on courts determining private rights under the Fourteenth Amendment, nonetheless they are entitled to great weight in the formulation by the judiciary of constitutional standards. See *Skidmore v. Swift & Co.*, 323 U. S. 134, 137, 139-140; *United States v. American Trucking Associations, Inc.*, 310 U. S. 534; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294; *United States v. Jefferson County Board of Education*, *supra*, 380 F. 2d at 390.

That HEW accepts free choice plans as establishing the eligibility of a district for federal aid does not, of course, mean that such plans are constitutional. The available evidence indicates that HEW has approved such plans, despite the massive evidence of their inability to disestablish the dual system, only because they have received approval in the courts. It feels, perhaps properly, that it may not enforce requirements more stringent than those imposed by the Fourteenth Amendment. Cf. 45 CFR 181.2(1) and 181.6 which provide, in effect, that districts under court order are eligible for aid. See also, the materials collected in Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 Va. L. Rev. 42 (1967); Note, *The Courts, HEW and Southern School Desegregation*, 77 Yale L. J. 321 (1967). Change then must come from the courts.

⁴⁵ In the Sixth Circuit, see *Brenda K. Monroe v. Board of Commissioners of the City of Jackson, Tenn.*, 380 F. 2d 955 (1967),

circuits which have spoken to the question have taken the position that a desegregation plan need not "work"—that is disestablish the dual system by destroying racial identification of schools. In *United States v. Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1966), *aff'd with modifications on rehearing en banc*, 380 F. 2d 385 (1967), *cert. den. sub nom. Caddo Parish School Board v. United States*, 389 U. S. 840, the Fifth Circuit, in what has so far been the most thorough judicial examination of school desegregation, specifically rejected the *Briggs* theory that *Brown, I* and the Constitution do not require integration but only an end to enforced segregation. Concluding that "integration" and "desegregation" mean one and the same thing, the court used the terms interchangeably to mean the achievement of a "unitary non-racial [school] system." Judge Wisdom analyzed the problem (372 F. 2d 836, 866):

We do not minimize the importance of the Fourteenth Amendment rights of an individual, but there was more at issue in *Brown* than the controversy between certain schools and certain children. *Briggs* overlooks the fact that Negroes are collectively harmed when the state by law or custom operates segregated schools or a school system with uncorrected effects of segregation.

.

What is wrong about *Briggs* is that it drains out of *Brown* that decision's significance as a class action to secure equal educational opportunities for Negroes by

now under review in No. 740 and *Kelley v. Board of Education of the City of Nashville, Tenn.*, 270 F. 2d 209 (6th Cir. 1959).

compelling the states to reorganize their public school systems (*Id.* at 865).

He concluded (*Id.* at 866):

Segregation is a group phenomenon . . . Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools: it calls for liquidation of the state's system of de jure school segregation and the organized undoing of the effects of past segregation.

.

. . . the only adequate redress for a previously overt system-wide policy of segregation directed at Negroes as a collective entity is a system wide policy of integration (*Id.* at 869). (Emphasis in original.)

.

We use the terms "integration" and "desegregation" of formerly segregated public schools to mean the conversion of a de jure segregated dual system to a unitary, non-racial (non-discriminatory) system—lock, stock and barrel; students, faculty, staff, facilities, programs and activities (*Id.* at 846; Note 5)."

On rehearing *en banc*, the majority, while reaffirming the panel opinion, put it this way (380 F. 2d 385, 389);

"The Court held that school officials in formerly de jure systems have "an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored" (372 F. 2d 836, 846). The test for any school desegregation plan, said the court, is whether it achieves the "substantial integration" which is constitutionally required and that a plan not accomplishing that result must be abandoned and another substituted (*Id.* at 895-896).

[School] Boards and officials administering public schools in this circuit [footnote omitted] have the affirmative duty under the Fourteenth Amendment to bring about, *an integrated unitary school system, in which there are no Negro schools and no white schools—just schools.* Expression in our earlier opinions distinguishing between integration and desegregation [footnote omitted] must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual system in this circuit requires integration of faculties, facilities and activities, as well as students.” (Emphasis added.)

Most of the other circuits have joined the Fifth Circuit in requiring that school boards employ affirmative action to “undo” the racial segregation they had previously created and that desegregation plans “work”—result in inte-

⁴⁷ Even before *Jefferson*, the Fifth Circuit had said (*Singleton v. Jackson Municipal Separate School District*, 355 F. 2d 865, 869 (1966)):

The Constitution forbids unconstitutional state action in the form of segregated facilities, including segregated public schools. School authorities, therefore, are under the constitutional compulsion of furnishing a single, integrated school system . . .

This has been the law since *Brown v. Board of Education* Misunderstanding of this principle is perhaps due to the popularity of an over-simplified dictum that the constitution “does not require integration.”

And in an earlier stage of the same case: “Judge Parker’s well-known dictum . . . should be laid to rest.” 348 F. 2d 729, 730 (1965).

gration sufficient to disestablish the prior state-imposed racial identification of schools. In *Kemp v. Beasley*, 352 F. 2d 14, 21 (1965), the Eighth Circuit stated "the dictum in *Briggs* has not been followed in this Circuit and is logically inconsistent with *Brown*." In a later case, *Kelley v. The Altheimer, Arkansas Public School District, No. 22*, 378 F. 2d 483 (8th Cir. 1967), emphasizing the obligation of formerly *de jure* school boards to disestablish, by affirmative action the identities of formerly all-Negro and all-white schools, the court stated:

We have made it clear that a Board of Education does not satisfy its obligation to desegregate by simply opening the doors of a formerly all-white school to Negroes [footnote omitted] (*Id.* at 488).

.

The appellee School District will not be fully desegregated nor the appellants assured of their rights under the Constitution so long as the Martin School clearly *remains identifiable as a Negro school*. The requirements of the Fourteenth Amendment are not satisfied by having one segregated and one desegregated school in a District. We are aware that it would be difficult to desegregate the Martin School. However, while the difficulties are perhaps largely traditional in nature, the Board of Education has taken no steps since *Brown* to attempt to change its identity from a racial to a non-racial school (*Id.* at 490).⁴⁸ (Emphasis added.)

⁴⁸ *Raney v. The Board of Education of the Gould School District*, 381 F. 2d 252 (8th Cir. 1967) suggests a withdrawal from *Kelley* and a return to *Briggs* (cf. 381 F. 2d at 255-256). Appellants in that case moved for rehearing *en banc* or by the panel adverting to the conflict between panels. The motion was denied September 18, 1967.

To the same effect are *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F. 2d 158 (10th Cir. 1967), *cert. den.*, 387 U. S. 931,⁴⁰ and *Evans v. Ennis*, 281 F. 2d 385, 389 (3rd Cir. 1960); "The Supreme Court has unqualifiedly declared integration to be their constitutional right."

This Court granted certiorari January 15, 1968, No. 805. See p. 13, *supra*.

The recent decision in the second appeal in *Kemp v. Beasley*, — F. 2d —, No. 19017, January 9, 1968, is, however, a reaffirmation of the principles enunciated in the first *Kemp* decision (352 F. 2d 14) and in *Kelley*.

⁴⁰In the *Oklahoma City* case, the School District adopted in 1955, in response to *Brown*, a unitary zoning plan which preserved, because of residential housing patterns, substantial segregation of the races and over which it superimposed a "minority to majority" transfer provision of the type condemned by this court in *Goss v. Board of Education of the City of Knoxville, Tenn.*, 373 U. S. 683. At the time of the district court's final decision in 1965, 80% of the Negro students in the system were still attending schools which were all-Negro or at least 95% Negro. In addition, little or nothing had been done to integrate faculties. The district court found (244 F. Supp. 971, 976 (W. D. Okla. 1965)):

That the Board had failed to desegregate the public schools in a manner so as to eliminate . . . the tangible elements of the segregated system.

. . . where the cessation of assignment and transfer policies based solely on race is insufficient to bring about more than token change in the segregated system, *the Board must devise affirmative action reasonably purposed to effectuate the desegregation goal.* (Emphasis added.)

It ordered, *intra alia*, as a panel of educational administrators had recommended, changes in the grade structures of some schools and the adoption of a "majority to minority" transfer provision. Although such a provision—one which permits a student to transfer only from a school in which his race is in the majority to a school where his race will be in the minority—is not a racially neutral rule, and, in fact, has the effect of promoting integration, the Tenth Circuit approved the district court order. Said the Court, "[u]nder the factual situation here we have no difficulty in sustaining the trial court's authority to compel the board to take specific action in compliance with the decision so long as such compelled action can be said to be necessary for the elimination of . . . unconstitutional evils . . ." (375 F. 2d at 166). It found all such actions necessary.

4. Equitable Analogies.

The second *Brown* decision, declared that "in fashioning and effectuating the decrees, the courts will be guided by equitable principles" (349 U. S. at 300). Equity courts have broad power to mold their remedies and adapt relief to the circumstances and needs of particular cases. Where, as here, the public interest is involved "those equitable powers assume an even broader and more flexible character . . ." *Porter v. Warner Holding Co.*, 328 U. S. 395, 398. Accordingly, such courts have required wrongdoers to do more than cease unlawful activities and compelled them to take affirmative steps to undo effects of their wrongdoing. *Louisiana v. United States*, 380 U. S. 145, 154 involved such a decree:

The court has not merely the power but the duty to render a decree which will so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

Under the Sherman Anti-trust Act, unlawful combinations are dealt with by dissolution and stock divestiture. See e.g., *United States v. Crescent Amusement Co.*, 323 U. S. 173, 189 and cases cited; *Schine Chain Theatres v. United States*, 334 U. S. 110, 126-130. Similarly, where a corporation has unlawful monopoly power which would operate as long as it retains a certain form, equity has required dissolution. *United States v. Standard Oil Co.*, 221 U. S. 1.

The same has been accomplished under the National Labor Relations Act where it was recognized early that disestablishment of an employer-dominated labor organization, "may be the only effective way of wiping the slate

clean and affording the employees an opportunity to start afresh in organizing . . .", *N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250; *American Enka Corp. v. N. L. R. B.*, 119 F. 2d 60, 63 (4th Cir. 1941); *Sperry Gyroscope Co. Inc. v. N. L. R. B.*, 129 F. 2d 922, 931-932 (2nd Cir. 1942); *Carpenter v. Steel Co.*, 76 NLRB 670 (1948).

5. Summary.

Of course, nothing we have said is directed to the question whether school boards in all places and all circumstances are under a constitutional duty to eradicate school segregation no matter how engendered. That question is not here.

Nor, do we think, as Judges Gewin and Bell have argued forcefully in their dissent in *Jefferson*, that to insist that a desegregation plan (of a district formerly segregated by law) "work" is to impose a special rule on 17 states but not on other states whose schools might equally be segregated. See 380 F. 2d at 397-398, 413-414. Segregation in the systems before that court was directly traceable to state action. It was certainly within the court's power (and, indeed, its duty under the *Brown* decisions) to require that that segregation be undone. In any event, the fact that segregation caused by residential patterns might have the same effect on Negro pupils as segregation caused by state law does not insulate the latter from the Fourteenth Amendment merely because no remedy has yet been prescribed for the former.

Our submission is: where racial segregation is the product of unconstitutional acts or policies, the mere allowance of a choice of schools does not satisfy the duty to effect

a unitary non-racial system, if, in fact, the overwhelming majority of students continue to attend schools previously designated by law for their race.

The Fifth Circuit in *Jefferson* did not hold and we do not urge, that freedom of choice plans are unconstitutional *per se*. Indeed, in areas where residential segregation is substantial and entrenched, a free transfer system might be of assistance in the achievement of desegregation. Rather, our position is that a freedom of choice plan is not, in the late sixties, an "adequate" desegregation plan (*Brown II*, *supra*, 349 U. S. at 301), where, as here, there is another plan, more feasible to administer, which will more speedily and effectively disestablish the dual system.⁵⁰

⁵⁰ The dissenters' opinions in *Jefferson* create the mistaken impression that free choice is an established, sensible method of pupil assignment:

Freedom of choice means the unrestricted, uninhibited, unrestrained, unhurried and unhurried right to choose where a student will attend public school . . . (380 F. 2d at 404).

* * * * *

Accordingly while professing to vouchsafe freedom and liberty to Negro children, [the Judges in the majority] have destroyed the freedom and liberty of all students, Negro and white alike (*Id.* at 405).

But, as we point out in the Introduction (pp. 13-27, *supra*), permitting students to assign themselves is entirely novel, administratively wasteful, racially motivated, and incapable of disestablishing the dual system. "Freedom of choice," despite its appealing title, should constantly be viewed as what it is: another sophisticated device school boards have developed in their long fight to neutralize the *Brown* decision.

III.

The Record Clearly Shows That a Freedom of Choice Plan Was Not Likely to Disestablish and Has Not Disestablished the Dual School System and That a Geographic Zone Plan or Consolidation Would Immediately Have Produced Substantial Desegregation.

Plaintiffs' exhibits showed, Judge Sobeloff observed, and the available census figures confirmed, that there was no residential segregation in New Kent County. Separate buses maintained for the races traversed all areas of the county picking up children to be taken to the school maintained for their race. Yet, instead of geographically zoning each school as logic and reason would seem to dictate,⁵¹ and as it almost certainly would have done had all children been of the same race, the School Board gratuitously adopted a free choice plan thereby incurring the administrative hardship of processing choice forms and of furnishing transportation to children choosing the school farthest from their homes. Indeed, in view of the lack of residential segregation it can fairly be concluded that the dual school system could not continue, as Judge Sobeloff has said (see p. 10 *supra*), but for free choice. Freedom of choice has been, at least in this community, the means by which the State has continued, under the guise of desegregation, to maintain segregated schools.

The Board could not, in good faith, have expected that enough students would choose the school previously closed

⁵¹ Compare Judge Sobeloff's suggestion quoted at p. 10, *supra* (76-77a) that the dual system could immediately be eliminated and a unitary non-racial system achieved by the assignment of students in the eastern half of the county to New Kent and those in the western half to Watkins.

to them to produce a truly integrated system. The evidence belies this. The Board had, for several years prior to the adoption of free choice in 1965,⁵² operated under the Virginia Pupil Placement Act, under which any student, could, as in free choice, choose either school. When the New Kent Board adopted free choice, no Negro student had ever chosen to transfer to the white school and no white student had ever chosen to attend the Negro school (25a, no. 7). Thus, at the time the Board adopted free choice, it was clear, based on related experience under the Pupil Placement Law, that free choice would not disestablish the separate systems and produce a "unitary non-racial system."⁵³

⁵² Although the Board adopted its plan in August, 1965, it was not approved by the Court and actually implemented until the Fall term of 1966.

⁵³ The use, in this case, of a free choice plan is subject to serious question on the ground that it promotes invidious discrimination. By permitting students to choose a school, instead of assigning them on some rational non-racial basis, the school board allows students invidiously to utilize race as a factor in the school selection process. Thus it is that white students invariably choose the formerly white school and not the Negro school. To be sure the Constitution does not prohibit private discrimination. But states may not designedly facilitate the discriminatory conduct of individuals or lend support to that end. See *Reitman v. Mulkey*, 387 U. S. 369; *Robinson v. Florida*, 378 U. S. 153; *Anderson v. Martin*, 375 U. S. 399; *Goss v. Board of Education*, 373 U. S. 683. See also, Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection and California's Proposition 13*, 81 Harv. L. Rev. 69 (1967). Cf. *Burton v. Wilmington Parking Authority*, 365 U. S. 715. Thus in *Anderson*, this Court held that although individual voters are constitutionally free to vote partly or even solely on the basis of race, the State may not designate the race of candidates on the ballot. Such governmental action promotes and facilitates the voters' succumbing to racial prejudice. So too here, giving students in a district formerly segregated by law the right to choose a school facilitates and promotes choices based on race.

It is no answer that some students may not, in fact, use race as a factor in the choice process. In *Anderson*, the statute was not saved

Nor has it done so in the years since its adoption. But for the relatively small number of Negro children attending the formerly white school the two schools are operated substantially as before *Brown*. "The transfer of a few Negro children to a white school does not," as the Fifth Circuit has observed, "do away with the dual system." *United States v. Jefferson County Board of Education, supra*, 372 F. 2d at 812.⁵⁴ During the current school year, 1967-68, only 115 (approximately 15%) of the 736 Negroes in the New Kent School District attend school with whites at the New Kent school. No whites are attending and, indeed, none have ever attended Watkins, the Negro school. A full generation of school children after *Brown*, 85% of New Kent's Negro children still attend a school that is entirely Negro. Here, as in most districts utilizing free

because some persons might vote without regard to the race of the candidate. It is the furnishing of the opportunity that is prohibited by the Constitution.

We do not argue that a school board may never permit students to choose schools. And certainly systems using attendance zones would not run afoul of the Constitution by permitting students to transfer for good cause shown. Presumably in such instances a legitimate non-racial reason would have to be supplied.

Nor do we argue that freedom of choice may never be used where race is intended to be a factor. For in a system in which residential segregation is deeply entrenched, the allowance of a choice of schools based on race may be a useful way to achieve desegregation. There, however, the plan is being used to *undo* rather than *perpetuate* segregation as the plan in this case is being used to do. Cf. *Goss, supra* at 688, where this Court stated that "no plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."

⁵⁴ The Eighth Circuit puts it another way:

School boards must recognize the constitutional inadequacy of maintaining school systems where the formerly all white school has the appearance of only token integration and the all Negro school is still perpetuated as a separate unit."

Kemp v. Beasley, — F. 2d —, No. 19017, January 9, 1968, slip op. at 4.

choice, one-half of the dual system has been retained intact. Nothing but race can explain the continued existence of this all-Negro school and defer indefinitely its elimination where both races are scattered throughout the county. "Perpetuation of [this] all-Negro school in a formerly de jure segregated school system is simply constitutionally impermissible." *Kemp v. Beasley*, — F. 2d —, No. 19,017, January 9, 1968, slip op. at 8.

The duty of the Board was to convert the dual school system created by state law and local rules in derogation of petitioners' rights into a "unitary non-racial system." It had a common sense alternative—geographic zoning—which the record shows would have disestablished the dual system more speedily and with much less administrative hardship than the free choice device it ultimately chose. But that was not the only alternative: the Board could have consolidated the two facilities into one school with one site, for example, serving grades 1-7 and the other grades 8-12.⁵⁵ This would have resulted in a more efficiently operated system enabling better equipment and expanded course offerings,⁵⁶ and immediately would have produced an integrated system. The most important study of secondary education in this country, James Bryant Conant's, *The American High School Today* (1959), gives highest priority to the elimination of small high schools graduating

⁵⁵ New Kent has apparently never utilized separate junior high schools. Both Watkins and New Kent are operated on the basis of 7 elementary grades and 5 high school grades (no. 14, 26a).

⁵⁶ No extended argument is needed to support the proposition that a school board can more economically furnish one well-equipped science laboratory, than two of mediocre quality. Similarly, where particular course offerings depend on student demand, more such courses might be offered after consolidation.

classes of less than one hundred.⁵⁷ Here, New Kent County, despite this opportunity to provide a broader and more intensive educational experience to all students, both Negro and white, continues wastefully to maintain two separate sites, each graduating but 30-35 students each year.

To be sure, the Fourteenth Amendment does not require that school administrators in *Brown*-affected states operate their systems in the most efficient manner. But the motive of a school board which has needlessly converted to free choice in an area where the races are interspersed comes more clearly into focus when examined against the background of available options.

The Board's construction policies shed further light on its motives. As late as June, 1965, the Board announced its intention to make identical additions at both Watkins and New Kent (at each, 4 classrooms—2 seventh, 2 sixth) (no. 19, 27-28a). And, in December 1966, six months after the district court had approved its desegregation plan (allegedly designed to achieve a unitary non-racial system), both four room additions were opened. Adding equally, in the context of free choice, to each of two sites, one traditionally maintained for Negroes, the other for whites,

⁵⁷ "The enrollment of many American public high schools is too small to allow a diversified curriculum except at exorbitant expense . . . The prevalence of such high schools—those with graduating classes of less than one hundred students—constitutes one of the serious obstacles to good secondary education throughout most of the United States. I believe such schools are not in a position to provide a satisfactory education for any group of their students—the academically talented, the vocationally oriented, or the slow reader. The instructional program is neither sufficiently broad nor sufficiently challenging. A small high school cannot by its very nature offer a comprehensive curriculum. Furthermore, such a school uses uneconomically the time and efforts of administrators, teachers, and specialists, the shortage of whom is a serious national problem" (p. 76).

indicates, we submit, an intention by the Board to *reinforce*, rather than *disestablish* the dual system.⁵⁸

Most important, however, the success of free choice depended on the ability of Negroes to unshackle themselves from the psychological effects of prior state-imposed racial discrimination, and to withstand the fear and intimidation of the present and future. Neither of the other alternatives (geographic zones or restructuring grades) under which assignments would be made by the Board—as they had been until *Brown*—would subject Negroes to the possibility of intimidation or give undue weight, as does free choice, to the very psychological effects of the dual system that this Court found objectionable.⁵⁹ Instead of fashioning a decree which would “as far as possible eliminate the discrimina-

⁵⁸ Its construction policies have apparently remained unchanged. Only a few months ago the Board voted unanimously to construct, *inter alia*, two new gymnasiums, one at Watkins, the other at New Kent. *Richmond Times-Dispatch*, Thursday, Aug. 24, 1967, p. B-8.

A similar inference (of an intention to reinforce rather than disestablish the dual system) was made in *Kelley v. Altheimer Arkansas Public School District No. 22*, 378 F. 2d 483 (8th Cir., 1967) discussed at p. 36, *supra*. There, as here, the school board added additional classrooms at each of two complexes, one traditionally maintained for Negroes, the other for whites. Said the Court (*Id.* at 497):

We conclude that the construction of the new classroom buildings had the effect of helping to perpetuate a segregated school system and should not have been permitted by the lower court.

See also *Id.* at 495-496. Cf. section VII of the decree appended by the United States Court of Appeals for the Fifth Circuit to its opinion in the *Jefferson County* case, where the court ordered that school officials (380 F. 2d at 394)

locate new school[s] and [expansions of] existing schools with the objective of eradicating the vestiges of the dual system.

⁵⁹ In a related context, this Court has said {

It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. *Line v. Wilson*, 307 U. S. 268, 276. Cf. pp. 22-23 and Note 29, *supra*.

tory effects of the past" (cf. *Louisiana v. United States*, 380 U. S. 145, and the other cases discussed at pp. 38-39, *supra*), the lower courts have, by approving free choice, permitted the Board to utilize those discriminatory effects to maintain its essentially segregated system.

Nor did the Board introduce any evidence to justify its method, which, if it could disestablish the dual system at all, would require a much longer period of time than the method petitioners had urged upon the Court. As this Court said in *Brown II* (349 U. S. at 300):

The burden rests upon the defendants to establish that such time [in which to effectuate a transition to a racially non-discriminatory system] is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

It was, therefore, error for the court below to approve the freedom of choice plan in the face of petitioners' proof, especially when the Board failed to show administrative reasons, cognizable by *Brown II*, justifying delay.

The data regarding assignment of teachers also reveal the failure of the Board to disestablish the dual system. The racial composition of the faculty at each school during the current year (1967-68) mirrors the racial composition of the student bodies. No Negroes are among the 28 full-time teachers at the formerly all-white New Kent school; only one Negro teacher is assigned there and that is for the equivalent of one day each week. At Watkins, only one of some 30 teachers is white. Thus, neither of the only two schools in the county has lost, either in terms of its students or faculty, its racial identification.⁶⁰

⁶⁰ The failure of the Board to take meaningful steps to integrate its faculties is consistent with what the record shows: that the

Only occasionally in the fourteen years since *Brown* has this Court reviewed lower court supervision of the transition to non-discriminatory systems. This may have been due in part to the belief voiced in *Brown II*, that "the [district] courts, because of their proximity to local conditions . . ." could best oversee the transition. (349 U. S. at 298). With the enactment of Title VI, however, the situation has changed. Whereas the first decade of litigation produced only token compliance with *Brown*, more has been accomplished by HEW's implementation of Title VI.⁶¹ Indeed, as the Civil Rights Commission has found, "the major federal role in Southern school desegregation [has] shifted from the federal courts to [HEW]." ⁶²

Title VI enforcement by HEW has at its disposal ample resources not available to courts. In assisting a district to regain or attain eligibility for federal funds it can utilize educational experts, field investigators and other professional personnel. But HEW relies on the courts to articulate the standards it implements. (Note 44 *supra*.) Thus, its effectiveness in converting the principles enunciated in *Brown* into living experience for school children, will

Board, by adopting free choice, could not in good faith have believed or intended that the dual system would thereby be converted into the non-racial system required by the Constitution. "[F]aculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system." *Clark v. Board of Education, Little Rock School District*, 369 F. 2d 661, 669-670 (8th Cir. 1966); *United States v. Jefferson County Board of Education*, *supra*, 372 F. 2d at 883-885; *Bradley v. School Board of the City of Richmond*, 382 U. S. 103; *Rogers v. Paul*, 382 U. S. 198.

⁶¹ " . . . [M]ore Negro children have entered schools with white children during this period [the 3 years since enactment of Title VI] than during all of the 10 previous years." *Southern School Desegregation, 1966-67*, at 90.

⁶² *Id.* at 1.

be enhanced by this Court's articulation of governing standards.

We repeat, however, that our thrust is limited rather than general; we do not urge that a freedom of choice plan is unconstitutional *per se* and may never be used. Our submission is simply that it may not be used where on the face of the record there is little reason to believe it will be successful and there are other methods, more easily administered, which will more speedily and effectively disestablish the dual system.⁶³

⁶³ A trend away from freedom of choice seems to have developed recently in some of the lower courts. A recent order of a district court in Virginia appears to have adopted the view we urge. See *Corbin v. County School Board of Loudon County, Virginia*, C. A. No. 2737, E. D. Va., August 27, 1967. In Loudon County, as in this case, Negroes were scattered throughout the County. The district court had approved in May, 1963 a freedom of choice plan of desegregation. In April, 1967, plaintiffs and the United States filed motions for further relief contending that the freedom of choice plan had resulted in only token or minimal desegregation with the majority of Negroes still attending all-Negro schools. They requested that the district be ordered to desegregate by means of unitary geographic attendance zones drawn without regard to race. The district court agreed and on August 27th entered an order directing that:

No later than the commencement of the 1968-69 school year the Loudon County Elementary Schools shall be operated on the basis of a system of compact, unitary, non-racial geographic attendance zones in which, there shall be no schools staffed or attended solely by Negroes. Upon the completion of the New Broad Run High School, the high schools shall be operated on a like basis.

See also *Moses v. Washington Parish School Board*, — F. Supp. — (E. D. La., October 19, 1967), discussed at pp. 19-20, *supra*. Cf. Orders requiring the use of geographic zones in *Coppedge v. Franklin County Board of Education*, 273 F. Supp. 289 (E. D. N. C. 1967) appeal pending, discussed in Note 31, *supra*, and *Braxton v. Board of Public Instruction of Duval County, Florida*, No. 4598 (M. D. Fla.), January 24, 1967.

So far as we are aware the first and only court order disapproving free choice, prior to the cases discussed above, was entered in *Mason v. Jessamine County Board of Education*, 8 Race Rel. L. Rep. 530 (E. D. Ky. 1963).

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the judgment of the United States Court of Appeals should be reversed. The case should be remanded to the district court with instructions to conduct immediately a hearing on whether some other method of pupil assignment would, consistently with sound educational principles, sooner disestablish the dual system. If such be the case that court should order that the speedier method be employed by defendants.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

CHARLES C. GREEN, ET AL., PETITIONERS

v.

COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA, ET AL.

BRENDA K. MONROE, ET AL., PETITIONERS

v.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON,
TENNESSEE, ET AL.

ARTHUR LEE RANEY, ET AL., PETITIONERS

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL
DISTRICT, ET AL.

ON WRITS OF HABEAS CORPUS TO THE UNITED STATES COURTS OF
APPEALS FOR THE FOURTH, SIXTH AND EIGHTH CIRCUITS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 695

CHARLES C. GREEN, ET AL., PETITIONERS

v.

COUNTY SCHOOL BOARD OF NEW KENT COUNTY,
VIRGINIA, ET AL.

No. 740

BRENDA K. MONROE, ET AL., PETITIONERS

v.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON,
TENNESSEE, ET AL.

No. 805

— ARTHUR LEE RANEY, ET AL., PETITIONERS

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL
DISTRICT, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF
APPEALS FOR THE FOURTH, SIXTH AND EIGHTH CIRCUITS*

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The central issue in these cases is the character and extent of the State's constitutional obligation in desegregating its public school system pursuant to

the mandate of *Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294. Although it is only one aspect of the problem, we focus on the pupil assignment policies of the three school districts involved because that is the most obvious defect of the plans in suit. Faculty desegregation and other measures designed to erase the labels "white" and "Negro" from the schools of the system are, of course, essential, as the courts below recognized. But effective desegregation is not accomplished so long as there remain all-Negro schools, attended by an overwhelming majority of the Negro children. It is that result in these cases, avoidable by employing a differing assignment technique, which invokes our concern.

In effect, each of the systems uses the so-called "freedom-of-choice" plan, under which each student is free to assign himself to any school in the district.¹ In each instance, a strict geographic assignment policy without the right of free transfer would desegregate the schools. In fact, more than 80% of the Negro children attend all-Negro schools, and this is attributable to a plan which permits the white students to assign themselves elsewhere. Nor are these isolated cases. "Freedom-of-choice" plans are much in vogue today, and the consequences are often the same. See

¹ In New Kent, Virginia (No. 695), every student entering the first and eighth grades is required to choose a school; thereafter, he is re-assigned to the same school unless he affirmatively elects a different school. In Jackson, Tennessee (No. 740), initial assignments are made by geographic zones, but every student is free to transfer to any other school. In Gould, Arkansas (No. 805), every student is apparently required to choose his school each year.

U.S. Commission on Civil Rights, *Southern School Desegregation 1966-1967* (1967), pp. 3, 8-9, 45-46, 94-95. The question is whether this technique is constitutionally permissible when it has the effect of substantially minimizing desegregation. The courts below answered in the affirmative, reasoning that it was enough if the school authorities removed all legal barriers to desegregation, leaving it to the students themselves to mix or not, as they chose.

In our view, so-called "freedom of choice" plans satisfy the State's obligation only if they are part of a comprehensive program which actually achieves desegregation. We do not contend that "freedom-of-choice" is *per se* invalid as an assignment technique or that its presence automatically condemns the desegregation plan of which it is a part. If substantial progress in eliminating all-Negro schools is shown, the Constitution does not forbid freedom of choice as an element in the plan. But when the results are like those reflected by these records, two objections must be interposed: *First*, against a background of prior State-compelled educational segregation, a freedom-of-choice plan that does not operate to eliminate all-Negro schools is an inadequate remedy to disestablish the dual school system; *secondly*, if the effect is to retard or defeat the desegregation that a geographic assignment policy would produce, allowing the students to make their own assignments impermissably abdicates the State's responsibility while effectively authorizing and facilitating public school segregation at the instance of the white students, with official sanction.

I

At the outset, we consider the plans in suit in their factual context. So judged, they are plainly inadequate as remedial devices responsive to the evils created by the previous *de jure* segregation in the three school districts. The persistence of all-Negro schools in all three systems is eloquent testimony to the fact that mere abandonment of compulsory student assignments based on race is insufficient to eliminate the continuing momentum of the past dual system. And it is apparent that the approach represented by the "freedom-of-choice" and "free transfer" provisions of the approved desegregation plans is essentially one of "laissez faire," and will not substantially improve the *status quo*.

Against the background of educational segregation long maintained by law, the duty of school authorities is to accomplish "the conversion of a *de jure* segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities." *United States v. Jefferson County Board of Education*, 372 F. 836, 846, n. 5 (C.A. 5), affirmed on rehearing *en banc*, 380 F. 2d 385, certiorari denied, 389 U.S. 840. And see *Bradley v. School Board*, 382 U.S. 103; *Rogers v. Paul*, 382 U.S. 198. That is not a self-executing task. Here, no less than in other areas where governmentally imposed racial discrimination was deep-rooted and pervasive, a mere abandonment of the old practices will not restore the balance. Cf. *Louisiana v. United States*, 380 U.S. 145, 154; *South Carolina v. Katzenbach*, 383 U.S. 301, 327-337. Neutrality is not

enough; affirmative measures must be taken to overcome the effects of past discrimination and reverse the direction.

An essential goal of the conversion process is to terminate the racial identification of particular schools as "Negro" schools or "white" schools. That aspect of the problem is highlighted in two of the cases before the Court (Nos. 695 and 805), involving systems with only two plants, one traditionally allocated to Negroes, the other to whites. Of course, the facilities must be equalized and deliberate steps must be taken to desegregate their faculties and staff. In some communities that may be enough to establish a new climate in which voluntary student desegregation will follow under a "freedom-of-choice" plan. And in other areas where residential patterns and the present location of schools would perpetuate segregation under a geographic assignment plan, a "freedom-of-choice" technique may offer more promise as an interim measure until new schools are constructed. But, as Judge Sobeloff observed below, concurring specially in the New Kent, Virginia case (No. 695, A. 79):

"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. * * *

In the circumstances of these cases, it is plain that "freedom-of-choice" is not a tool to achieve desegregation. On the contrary, in New Kent, Virginia, and

Gould, Arkansas, where geographic zoning would integrate the two schools of the district, it is apparent that "freedom-of-choice" works in the opposite direction, to perpetuate an identifiably "Negro" school, attended only by Negroes. And, although less dramatically, the "free transfer" policy followed in Jackson, Tennessee, likewise tends to defeat the substantial degree of pupil desegregation that would result from strict geographic zoning.

In our view, these facts alone condemn the plans in suit as inadequate measures to disestablish the dual school system. Cf. *Goss v. Board of Education*, 373 U.S. 683. But there are other reasons to question the constitutional validity of the "freedom-of-choice" technique as it operates here. These are broader grounds, which we think relevant, though the Court may find it unnecessary to reach them.

II

The actual results in these cases demonstrate that, in some circumstances at least, "freedom-of-choice" plans empower the white students effectively to segregate the school system by assigning themselves away from the schools they would otherwise be attending with Negroes. And there is no doubt that the consequence of racial isolation for the Negro children puts them at a disadvantage. Not only are they deprived of contacts and experiences which would enable them to participate on a more equal footing in the public and private life of the dominant community (see *Sweatt v. Painter*, 339 U.S. 629, 634-635; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 640-642; and see U.S. Commission on Civil Rights, *I Racial Isolation in*

the Public Schools (1967), pp. 100-114, 193, 203-204), but, shunned by the whites, the Negro children are unmistakably told that their separation is not the accidental result of neutral geographical zoning, but, rather, the deliberate consequence of a system which, as *Brown* emphasized (347 U.S. at 494), "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The question accordingly arises whether segregation, so caused, offends the Constitution.

The courts below thought the result constitutionally unobjectionable, apparently reasoning that the injury was self-inflicted in view of the seemingly equal opportunity given the Negro students to determine their own assignments and thus to avoid their separation by pursuing the white students. In our view, that is not an adequate answer.

1. Initially, we have difficulty with the premise that the Negro students in areas like those involved here enjoy a truly unencumbered option to move away from their traditional schools. The Fourth Circuit itself, in one of the cases under review (No. 695, A. 67), has emphasized that "'freedom of choice' is acceptable only if the choice is free in the practical context of its exercise." And the court went on to add that "[i]f there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them" (*id.*). But is this a realistic approach?

We do not believe that it is enough to eliminate only the grosser forms of intimidation—threats of

physical injury or economic reprisal—even assuming that judicial decrees or administrative action can effectively deal with such pressures. The reality is that a variety of more subtle influences—short of outright intimidation—tend to confine the Negro to his traditional school. Insecurity, fear, founded or unfounded, habit, ignorance, and apathy, all inhibit the Negro child and his parents from the adventurous pursuit of a desegregated education in an unfamiliar school, where he expects to be treated as an unwelcome intruder. And corresponding pressures operate on the white students and their parents to avoid the “Negro” school.² No doubt, special provisions in the

² Some of the factors at work are isolated in the report of the U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States—1965–1966* (1966), pp. 51–52, quoted by Judge Sobeloff, concurring below in the New Kent, Virginia case (No. 695, A. 80–81):

Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation.

"freedom-of-choice" plan can mitigate the play of these forces. But when the results are like those in these cases, we think it blinks reality to assume that the persistence of all-Negro schools is the consequence of wholly voluntary self-segregation by the Negro students.

2. Even if one could properly characterize the result as the product of truly free choice, however, it would be constitutionally objectionable because the exercise of the option involves an improper burden where the racial identity of the schools has not been eliminated. Thus, the Fourth and Fifth Circuits have disapproved transfer plans which require the Negro students to take special steps to obtain a desegregated education. In the words of the Fourth Circuit, in one of the cases under review (No. 695, A. 66):

The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents. It is the duty of the school boards to eliminate the discrimination which inheres in such a system.

See, also, *United States v. Jefferson County Board of Education*, *supra*, 372 F. 2d at 864-867. In our view, the same rationale condemns the present plans, which unnecessarily shift the burden to the Negro to seek his way out of his traditional school.

Under a plan like that prevailing in Jackson, Tennessee, where initial assignments are made by geographical zones, special steps must be taken to transfer elsewhere. That is, in itself, an obstacle. The burden on the Negro is not lightened because the white students must also assume it if they wish to avoid the

traditionally Negro school to which proximity first assigns them. Cf. *Griffin v. School Board*, 377 U.S. 218. Nor are the obstacles in fact equal in the situation that most concerns us, the persistence of the all-Negro school. Where students of both races have been initially assigned, on the basis of residence, to a traditionally Negro school, the decision to transfer elsewhere is obviously more difficult for the Negro. Unlike the white child whose "transfer" merely returns him to his accustomed school, the Negro is required to sacrifice old ties for an uncertain welcome if he wishes to pursue his search for a desegregated education.

Nor are these problems immediately overcome by the "freedom-of-choice" provisions prevailing in New Kent, Virginia, and Gould, Arkansas. Something is gained by requiring everyone to express a choice before any assignment is made. But that does not eliminate all the pressures weighing on the Negro—and to a lesser extent on the white—to "choose" in favor of the *status quo*. Again, an uneven burden falls on the Negro if he is to leave his traditional school. At least where all the white students have shunned the local Negro school, the decision to follow them requires courage, and, for the pioneers at least, a willingness to subordinate personal advantage to the common good of the race. See *Kelley v. Altheimer, Ark. Public School Dist. No. 22*, 378 F. 2d 483, 486-487, n. 6 (C.A. 8).

We do not mean to exaggerate the tendency of "freedom-of-choice" plans to perpetuate the all-Negro school or the special burden they impose on

Negroes to remove themselves from their old segregated institutions. Of course, individuals can resist the pressures and in some communities the technique may work. Yet, where, as in these cases, freedom-of-choice does not eliminate the all-Negro school, it would be pure irony if Negro children or their parents, already victims of educational segregation, suffering the very handicaps that this Court sought to avoid for the future, were held to have "waived" the promise of *Brown*. Cf. *Lane v. Wilson*, 307 U.S. 268, 276. However surmountable they may be, the Constitution does not tolerate the erection of unnecessary hurdles to the enjoyment of fundamental rights. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337. Cf. *Lamont v. Postmaster General*, 381 U.S. 301; *Harman v. Forssenius*, 380 U.S. 528; *Shelton v. Tucker*, 364 U.S. 479, 488; *Speiser v. Randall*, 357 U.S. 513; *Thomas v. Collins*, 323 U.S. 516.

3. The situation would be different if the burden, and the resulting injury, were unavoidable, or even if pupil assignment were traditionally a matter left to the free play of private choice. But that is not the fact. On the contrary, compulsory assignment of public school students had been the almost invariable rule, North and South, until *Brown*. Freedom-of-choice plans—haphazard and administratively cumbersome³—have been devised for the apparent purpose of allowing the white students to accomplish what the

³ See *Singleton v. Jackson Municipal Separate School District*, 355 F. 2d 865, 871 (C.A. 5).

State could no longer provide for them.⁴ Essentially, the assignment of students is a governmental function, controlled by the requirements of the Fourteenth Amendment. Cf. *Marsh v. Alabama*, 326 U.S. 501; *Terry v. Adams*, 345 U.S. 461; *Evans v. Newton*, 382 U.S. 296. And, as this Court observed in *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 725, "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."

The suggestion that the action of the students in effectively segregating themselves need be of no concern to the State may be compared to the proposition that the State, which has a constitutional duty to avoid discrimination in jury selection, is free to allow prospective jurors to separate themselves on racial lines for service on particular panels. The unconstitutionality of such a permissive arrangement is surely beyond debate. The reason is not that a defendant has a right to be tried by a racially representative jury (see *Cassell v. Texas*, 339 U.S. 282), but, rather, that the State may not permit discrimination to influence the selection of a jury. The same principle governs here: even if accidental segregation in public education is permissible, the Constitution does not tolerate

⁴ The lower courts have recognized that in some communities freedom-of-choice was adopted because alternative plans would require white pupils to attend Negro schools. See *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 479, n. 27 (M.D. Ala.), affirmed *sub nom. Wallace v. United States*, 389 U.S. 215; *United States v. Jefferson County Board of Education*, *supra*, 372 F. 2d at 878, 888-889. And see the testimony of the Superintendent of the Gould, Arkansas, schools (No. 805, A. 67).

schemes which invite that result to be accomplished by indirect means through a delegation of State responsibility. Cf. *St. Helena Parish School Board v. Hall*, 368 U.S. 515; *Goss v. Board of Education*, *supra*; *Griffin v. School Board*, *supra*; *Louisiana Financial Assistance Comm. v. Poindexter*, No. 793, this Term, decided January 15, 1968, affirming 275 F. Supp. 833 (E.D. La.).

In sum, where freedom-of-choice plans leave the schools essentially segregated, while a more traditional assignment policy would not, that segregation may fairly be attributed to the State. That conclusion alone covers the present cases. But the fact that the State is knowingly contributing to the result has another dimension also.

4. By resorting to a permissive device which, in context, seems to serve no purpose other than to defeat or retard integration, the State is declaring its approval of the discrimination which it allows to govern pupil assignments. The effect is two-fold: the apparent official sanction given to the preference of the white students aggravates the injury to the Negro children; and, at the same time, it lends encouragement to the separation of the white students and tends to stiffen those very attitudes that desegregation might relax.

There is, of course, nothing novel in the proposition that the Equal Protection Clause forbids official action which injures the Negro by implying his unfitness or inferiority as a class and encourages private racial prejudice. Indeed, this is the rationale of *Strauder v. West Virginia*, 100 U.S. 303, one of the

Clearly the respondents are not "duty bound" under the Fourteenth Amendment to compel Negro and white students alike, solely because of their race, to attend certain schools for the avowed purpose of integrating the races, their free choices to the contrary notwithstanding.

Later decisions of this Court likewise fail to support the petitioners' argument that the States have an obligation under the Fourteenth Amendment to enforce a mixed racial composition in their public school systems. In fact, this Court has conveyed the clear impression that a freedom of choice plan is constitutionally permissible under the *Brown* mandate, even though some sort of racial balance between Negroes and whites is not thereby produced throughout the school system. Thus, *Calhoun v. Latimer*, 377 U.S. 263 (1964), was remanded to the district court for an evidentiary hearing to determine whether the respondent's free transfer plan, with the addenda adopted subsequent to argument, satisfied the desegregation mandate of *Brown*.

Goss v. Board of Education of Knoxville, 373 U.S. 683, 689 (1963), focused on the elimination of "state-imposed racial conditions" in the transfer of pupils. There the plan re-zoned school districts without reference to race but set up a transfer system under which students, upon request, would be permitted—solely on the basis of their race and the racial composition of the school to which they had been assigned—to transfer from such school, where they would be in the racial minority, back to their former segregated school, where their race would be in the majority.

Although this Court held that a racial criterion for purposes of transfer between public schools was unconstitutional, it noted that:¹⁴

¹⁴373 U.S. at 687.

[I]f the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the schools to which he requested transfer we would have an entirely different case. *Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another.* (Emphasis added.)

The respondents' free choice plan is that "entirely different case" in which each pupil (or his parents) is free to choose which school he will attend, "entirely free of any imposed racial considerations." There the pupil (or his parents) had to show that he came under the majority-minority transfer rule to justify his choice. Here the pupils are not required to justify their choice by any racial criterion. It is unrestricted and unencumbered and, therefore, consistent with the following dictum from *Goss v. Board of Education of Knoxville, supra*, at 688-89:

This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions would fall. Likewise, *we would have a different case here if the transfer provisions were unrestricted*, allowing transfers to or from any school regardless of the race of the majority therein. (Emphasis added.)

There is no difference in principle in the respondents' plan, which gives to each pupil an unrestricted right each year to choose the school he wishes to attend, and a plan which assigns pupils on a non-racial basis and then gives them an unrestricted right each year to transfer to the school they wish to attend.

Although this Court has decided several other cases involving desegregation, the issue in most of them has been speed, *i.e.*, the number of grades to be desegregated within a given time. Speed is not an issue in this case. The respondents' desegregation plan applied to all grades in the schools effective the 1966-67 school year.

2. *In the other Federal Courts*

The gist of the petitioners' argument is that a public school system is segregated as long as there remains any school which is not attended by both white and Negro children. This argument was rejected by the three judge court on the remand in *Brown v. Board of Education of Topeka*, 139 F. Supp. 468, 470 (D. Kan. 1955) :

It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.

In *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955), Judge Parker made perhaps the most famous expression of the constitutional distinction embodied in the *Brown* mandate:

What [the Supreme Court] has decided . . . is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in

other words, does not require integration. It merely forbids discrimination.

This fundamental distinction is supported by decisions in the Circuit Courts of Appeal for the Fourth Circuit (*Bradley v. School Board of City of Richmond*, *supra*, which was followed by the Court of Appeals in the case at bar), the Sixth Circuit (*Monroe v. Board of Commissioners of City of Jackson*, 380 F. 2d 955 (1967)) (now under review in No. 740), the First Circuit (*Springfield School Committee v. Barksdale*, 348 F. 2d 261 (1965)), the Seventh Circuit (*Bell v. School City of Gary*, 324 F. 2d 209 (1963), *cert. den.*, 377 U.S. 924), the Eighth Circuit (*Clark v. Board of Education of Little Rock School District*, 369 F. 2d 661 (1966), *reh. den.*, 374 F. 2d 569)¹⁵ and the Tenth Circuit (*Downs v. Board of Education of Kansas City*, 336 F. 2d 988 (1964), *cert. den.*, 380 U.S. 914).

The same distinction is implicit in *Evans v. Ennis*, 281 F. 2d 385 (3d Cir. 1960). Although Judge Biggs' statement quoted on page 37 of the petitioners' Brief appears to support their position ("The Supreme Court has unqualifiedly declared integration to be their constitutional right."), it has been lifted out of the context of his repeated statements about Negro children who "desire," "seek" and "will seek" integration. There was no suggestion that the state was to compel integration where the children (or parents) did not desire or seek to attend school on an integrated basis. See also *Taylor v. Board of Education of City*

¹⁵*Contra*, *Kemp v. Beasley*, _____ F. 2d _____, No. 19017 January 9, 1968 (different panel of 8th Circuit). Compare *Raney v. Board of Education of Gould School District*, 381 F. 2d 252 (8th Cir. 1967) (now under review in No. 805), with *Kelley v. Altheimer, Arkansas Public School District*, *supra*, for a further illustration of the division in opinion among the panels in the Eighth Circuit.

School District of New Rochelle, 294 F. 2d 36 (2d Cir. 1961), *cert. den.*, 368 U.S. 940, where the court, after finding that the school board had deliberately drawn and maintained district lines to perpetuate a "Negro" school, decreed that the pupils were to be permitted (not compelled) to transfer to other schools.

Moreover, support for the petitioners' position is more apparent than real in *Board of Education of Oklahoma City Public Schools v. Dowell*, 375 F. 2d 158 (10th Cir. 1967), *cert. den.*, 387 U.S. 931. That case must be read in the light of *Downs v. Board of Education of Kansas City*, *supra*, where the use of geographic attendance zones had resulted in, some schools having an all white and some schools having an all Negro enrollment. The appellants' argument that this result rendered the zone plan unconstitutional was rejected by the court, at 998:

Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of *Brown v. Board of Education*, *supra*, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, *the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them.* (Footnote omitted.) (Citations omitted.) (Emphasis added.)

This principle was reaffirmed in the Oklahoma City case even though it required the school board to take affirmative action to promote integration. The distinction between the two cases is that in Oklahoma City the school

board had acted in bad faith in its plans (or lack thereof) to desegregate the school system (even failing to comply with a court order), while in the Kansas City case the school board had acted in good faith.

The Fifth Circuit alone has stated without qualification that there is no distinction in constitutional principle between "desegregation" and "integration," and that the states have a duty under the *Brown* mandate to take affirmative action to achieve a mixed racial composition in all schools in the system.¹⁶ This position runs counter to the cases cited above from the other circuits, to the proscriptive language of the Fourteenth Amendment, to the Civil Rights Act of 1964 and to the views of those who are trying to keep the educational lighthouse in sight amidst the turbulent seas of litigation.

"Segregation" is, according to the petitioners' definition, both a condition and an activity. In their use it means any situation in which all pupils in a particular school are of the same race, and apparently they contend that even so defined it is unconstitutional—at least in the South. The sounder view, it is submitted, is that merely the existence of a wholly white or wholly Negro school is not unconstitutional *per se*.¹⁷ The missing ingredient is someone who is discriminated against, who is denied admission solely because of race. This is the true focus of the *Brown* mandate, and it points up the distinctive meaning of the words involved. The mandate was thus understood by Jack Greenberg, principal counsel for the petitioners:¹⁸

¹⁶*United States v. Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1966), *aff'd with modifications on rehearing en banc*, 380 F. 2d 385 (1967) (four judges dissenting), *cert. den. sub. nom.*, *Caddo Parish School Board v. United States*, 389 U.S. 840.

¹⁷See Conant, Note 11, *supra*.

¹⁸Greenberg, *Race Relations and American Law* pp. 239-40 (1959). See Conant, Note 11, *supra*.

Moreover, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negroes may be legally equivalent to none. If, however, in education there were complete freedom of choice, or geographic zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection.

"Segregation," "desegregation" and "integration" are, therefore, words of art in legal contemplation, though it is significant that they are assigned distinctive meanings in other disciplines as well. Thus, Milton Myron Gordon, a sociologist at the University of Massachusetts, has written:¹⁹

Desegregation refers to the elimination of racial criteria in the operation of public or quasi-public facilities, services, and institutions, which the individual is entitled to as a functioning citizen of the local or national community, equal in legal status to all other citizens. . . . Integration, however, embraces the idea of the removal of prejudice as well as civic discrimination and therefore refers to much more.

Proper definitions of these terms can be framed on the basis of the great body of decisional law and the Civil Rights Act of 1964²⁰:

Segregation—a system whereby persons of different races are required by the state to attend public schools set apart for their use only and are denied admission to all other public schools by the state solely because of a racial criterion.

¹⁹Note 7, *supra*, p. 246. See generally Handlin, *The Goals of Integration*, from *Daedalus*, p. 268 (Winter 1966).

²⁰78 Stat. 241.

Desegregation—a plan whereby persons of different races are admitted to the public schools in the system without regard to their race.

Integration—the intermingling of persons of different races in the same public schools, either by the free choice of the persons themselves or by compulsory assignment by the state through the use of race as a criterion for assignment.

3. *In the Congress*

The legislative history of the Civil Rights Act of 1964 clearly shows that Congress did not intend or announce a national policy requiring the states to take affirmative action to achieve integration of the races in every school throughout the public school system. This is manifest from the statements of the Senate floor leader for the Act, Hubert H. Humphrey, whose language paraphrased Judge Parker in *Briggs v. Elliott*, *supra*.²¹

Judge Beamer's opinion in the Gary case [*Bell v. School City of Gary*, 213 F. Supp. 819 (N.D. Ind. 1963)] is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute.

I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. . . . *The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems.* (Emphasis added.)

Since Congress intended to write the "thrust" of the Gary opinion into the Civil Rights Act, an examination of that

²¹110 Cong. Rec. 12715, 12717.

case will disclose the national policy embodied in the Act. The third question presented to the court for determination in that case is the same that the petitioners now present to this Court:

Whether the plaintiffs [approximately 100 minor Negro children] and other members of the class have a constitutional right to attend racially integrated schools and the defendant has a constitutional duty to provide and maintain a racially integrated school system. *Id.* at 820.

The question was answered in the negative by Judge Beamer, who relied upon *Brown v. Board of Education of Topeka*, *supra*, and *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962). Judge Beamer quoted with approval from the latter case, at 830:

'[T]he States do not have an affirmative, constitutional duty to provide an integrated education. The pertinent portion of the Fourteenth Amendment . . . reads, "nor [shall any State] deny any person within its jurisdiction the equal protection of the laws." This clause does not contemplate compelling action; rather, it is a prohibition preventing the States from applying their laws unequally.'

Therefore, the Civil Rights Act of 1964 embodies the policy that, while no Negro shall be denied admission to any public school solely because of his race, there is no constitutional right to attend a racially integrated school and no corresponding duty on the state to achieve racial integration in all schools. Any lingering doubts should have been set to rest by the reaffirmation of this policy in the 1966 amendments to the Elementary and Secondary

Education Act of 1965, which added the emphasized language below:²²

In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency, *or require the assignment or transportation of students or teachers in order to overcome racial imbalance.*

C. FULFILLING THE *Brown v. Board of Education*
MANDATE: THE FREEDOM OF CHOICE PLAN

1. *Whether the plan "works"—constitutional principle or mathematical equation?*

Freedom of choice plans have met with approval despite the objections now made by the petitioners. The argument that they do not "work" because too few Negroes choose to attend formerly all white schools and whites seldom choose to attend the school formerly for Negroes alone was made and answered in *Clark v. Board of Education of Little Rock School District, supra*, at 666:

Plaintiffs are disturbed because only 621 of 7,341 Negroes in the Little Rock school system of 23,000 . . . were actually attending previously all white schools.²³ Thus, they argue that the 'freedom of choice' plan is not succeeding in the integration of the schools.

Though the Board has a positive duty to initiate a

²²80 Stat. 1212.

²³HEW Documents filed by the petitioners show that 115 of 736 Negroes are attending the formerly all white school in New Kent County, Virginia, in 1967-68.

plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas, or considering race in the assignment of students to their classrooms. . . . The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools.²⁴

A like objection to freedom of choice was rejected in *Bradley v. School Board of City of Richmond, supra*, at 315-16:

[T]he plaintiffs insist that there are a sufficient number of Negro parents who wish their children to attend schools populated entirely, or predominantly, by Negroes to result in the continuance of some schools attended only by Negroes. To that extent, they say 'hat, under any freedom of choice system, the state 'permits' segregation if it does not deprive Negro parents of a right of choice.

It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's

²⁴*Contra, Kemp v. Beasley, supra* (different panel).

right to be free from discrimination requires that the state deprive him of his volition is incongruous.

There is no hint [in *Brown*] of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.²⁵

2. *Private discrimination—promoted or suffered?*

The petitioners have varied the theme of the arguments in *Clark* and *Bradley* in an effort to bring freedom of choice within the pale, however peripheral, of proscribed "state action" under the Fourteenth Amendment. Thus, in note 53 on page 42 of their Brief they suggest that by permitting students (or parents) to choose their schools, the respondents promote invidious discrimination which renders the plan unconstitutional.²⁶

²⁵Under the respondents' freedom of choice plan there is a 15 day choice period each year, all school activities are covered, transportation is without regard to race, no person may be penalized or favored because of the choice made, and no school personnel may advise, recommend or influence choices. See *Goss v. Board of Education of Knoxville*, *supra*.

²⁶The same point is stressed by the Solicitor General in his amicus Memorandum. He seems to assume that a freedom of choice plan peculiarly enables school patrons to succumb to the blandishments of racial prejudice. In reality school patrons are as likely to succumb even where geographic zoning or pairing devices are employed. The experience in the North and Washington, D. C., bears this out. The fact of the matter is that, in terms of integration, Negroes have a greater option under the freedom of choice plan. This is true because

The flaw in this argument is that, while the petitioners concede that the Constitution does not prohibit private discrimination, they are unable to point to any *affirmative race-related activity* on the part of the respondents. It is settled, of course, that the state may remain neutral with respect to private racial discrimination. See *Reitman v. Mulkey*, 387 U.S. 369 (1967). And this would seem to be a sufficient answer to the petitioners' argument because here, unlike *Reitman v. Mulkey*, *supra*, and other so-called "state action" cases,²⁷ the state has made no classification on the basis of race and has not acted in any way to inject racial considerations in the free choice process.

The validity of the respondents' plan is not based upon their neutrality, however. It is based upon the fact that the respondents have taken affirmative action towards the elimination of race as a criterion in the school community under the free choice plan. Thus, the Choice of School Form sent annually is accompanied by a letter on the school board letterhead, signed by the Superintendent of Schools, stating the following:

Dear Parent:

A plan for the desegregation of our school system has been put into effect so that our schools will operate

people may choose where they will live and whether their children will attend a private school, but because of their economic condition and housing pattern Negroes do not enjoy the same choice. A freedom of choice plan alone enables Negroes to break away from housing patterns and a disadvantaged economic condition to achieve education in an integrated school. See *Clark v. Board of Education of Little Rock School District*, *supra*. Taliaferro County, Georgia, is a case in point. Its two schools were paired in 1965, when there were some 600 Negro students and 200 white students. In 1967 there were 527 Negro students and no whites. *United States v. Jefferson County Board of Education*, *supra*, at 416, n. 6.

²⁷E.g., *Robinson v. Florida*, 378 U.S. 153 (1964), *Anderson v. Martin*, 375 U.S. 399 (1964), and *Lombard v. Louisiana*, 373 U.S. 267 (1963).

in all respects without regard to race, color, or national origin.

[T]here will be no discrimination based on race, color, or national origin in any school-connected services, facilities, activities and programs.²⁸

The respondents have, therefore, committed the influence of their office to a nonracial school system and have commended such a system to the community by means of this letter and by the publicity and community preparation activities spelled out in Article X of the Plan for School Desegregation.²⁹

3. *Free choice—whose?*

The exercise of the choice in an acceptable freedom of choice plan was discussed by Judge Haynsworth in the companion case, *Bowman v. County School Board of Charles City County*, *supra*, at 327-28:

If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free.

Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for 'freedom of choice' is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be re-

²⁸The letter is set out in the petitioners' Appendix at pp. 43a-44a.

²⁹The Plan is set out in the Petitioners' Appendix at pp. 34a-40a.

quired to adopt affirmative measures to counter them.

Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination. (Emphasis added.)

Despite their concession in the Court of Appeals, the petitioners apparently take the position that a free choice for Negroes in the South is a contradiction in terms. Yet they were unable to offer for judicial appraisal by the District Court anything other than speculation and conjecture. Therefore, cases such as *Coppedge v. Franklin County Board of Education*, 273 F. Supp. 289 (E.D.N.C. 1967), are scarcely relevant.

Moreover, the petitioners' argument that Negroes in New Kent County do not have a free choice is, in logic, *post hac ergo propter hac*. From the fact that a greater number of Negro students have not chosen to attend the formerly all white school, the petitioners conclude that the Negroes do not have a free choice. What the petitioners overlook is that Negroes, like whites, may choose to remain in the same school simply because the surroundings are familiar and they have friends there.

Because they view any choice as the product of racial prejudice (whites) or coercion (Negroes) and disclaim non-racial choices, the petitioners would deny a choice to everyone—students and parents alike. The fundamental right of parents to direct the education of their children is, therefore, to be denied in the name of integration, their preference to the contrary notwithstanding.³⁰ /

³⁰Cf. *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 396 (1923).

4. *Compulsory integration in formerly de jure systems—
principle or purge?*

The petitioners argue that, since there was de jure segregation in the New Kent County schools at the time of *Brown v. Board of Education*, *supra*, the respondents have an affirmative duty under the Fourteenth Amendment to enforce integration of the races in every public school. In support of this unique argument, they quote at length from *United States v. Jefferson County Board of Education*, *supra*, which, interestingly enough, concluded by approving a freedom of choice plan.

There the court found such a duty following its re-examination of school desegregation standards in the light of the Civil Rights Act of 1964 and the HEW Guidelines. As we have seen, the congressional intent was to embody in the Act the decision of Judge Beamer in *Bell v. School City of Gary*, *supra*. In *Jefferson County* the court (divided 2-1) excised this intent by a tailored construction of the legislative history. It found that, although Senator Humphrey spoke several times in the language of *Briggs v. Elliott*, his references to *Bell v. School City of Gary* "indicated" that the policy against affirmative, compulsory action to achieve racial balance was directed to the Gary, Indiana, de facto segregation and did not apply to de jure segregation. Therefore, the court concluded, there was in fact a national policy that formerly de jure segregated public school systems were obligated to take affirmative action in order to achieve a mixed racial composition throughout the entire system.³¹

³¹The HEW Guidelines were considered an expression of such a national policy. In the instant case the petitioners did not, and properly so, predicate their case on the HEW Guidelines. Indeed, in note 44 on page 32 of their Brief the petitioners make an interesting

This conclusion is untenable, as four judges vigorously pointed out on the rehearing *en banc*. In the first place, the decision ignores the fact that the Gary school system had de jure segregation until 1949, and that Judge Beamer cited cases which upheld *Briggs v. Elliott*, clearly a de jure segregation situation. Secondly, the decision fashions a double standard under the Fourteenth Amendment, one for the South and another for the North, on the basis of the de jure-de facto distinction. This is without support in principle and reason. It completely rejects the fact that prior to 1954 racially separate, if equal, public schools had not been declared unconstitutional.

The real concern about *Jefferson County* is that it will not be understood for what it is—an exercise in “social engineering.”³² There is cause for optimism, however, because the decision was not accepted by the Fourth Circuit in this case, and the error in its de jure-de facto distinction was clearly seen in *Monroe v. Board of Commissioners of City of Jackson*, *supra*, at 958:

However ugly and evil the biracial school systems appear in contemporary thinking, they were, as *Jefferson*, *supra*, concedes, de jure and were once found lawful in *Plessy v. Ferguson* . . . and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by *Brown* would

concession regarding the Guidelines. They state that HEW has approved free choice plans, despite their inability to disestablish the dual system, only because such plans have received approval in the courts. “It feels, perhaps properly, that it may not enforce requirements more stringent than those imposed by the Fourteenth Amendment.” (Emphasis added.) This is tantamount to a concession by the petitioners that the requirements they now ask this Court to impose are more stringent than those imposed by the Fourteenth Amendment.

³²See Notes 8 and 9, *supra*. Cf. *Moses v. Washington Parish School Board*, 276 F. Supp. 834 (E. D. La. 1967).

be in the nature of imposing a judicial Bill of Attainder. . . . Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

5. *Integration and education—antitheticals?*

It is hoped that the educational lighthouse is still in sight. It calls for an equal educational opportunity for all children, regardless of race, color or national origin. The respondents maintain that their public school system offers an opportunity for each child to receive as good an education as every other child in the system, and apparently the petitioners do not challenge this in fact.

Their position seems to be that, as a matter of principle, the educational opportunity of Negro children is unequal and can never be equal unless they are made to attend classes with white children. Thus, if the free choices of children and parents produce schools which do not grant to Negro children the "advantage" of education with white children, the Negro children are, *ipso facto*, receiving an education inferior to that of the whites and their fellow Negroes who are attending school with whites.

That argument is manifestly erroneous in two respects. First, it assumes that Negro children who freely choose not to attend an integrated school are thereby harmed. It is too incredible for belief that this circumstance generates a feeling of inferiority as to their status in the community. Certainly this proposition has never been tested and proved: *Moses v. Washington Parish School Board, supra*. The second, and more fundamental error, was discussed in *Moses* at 845, 846:

It should be noted that the rather obvious objective of the proponents of the 'equal educational opportunity' theory is the elimination of racial prejudice

through the public school system, rather than the immediate fulfillment of equal educational opportunities for all students. Little has been put forth to prove that actual and active integration will in fact of itself raise the educational opportunities even of formerly segregated Negro students.

[T]he emphasis should always be on a good education for all students, and courts should refuse to rule that a particular all-Negro school, where the Negro concentration is fortuitous, is *ipso facto* unequal and that the solution to the 'problem' is the forced mixing of the races.

Long ago it was settled that the hearts and minds of Negro children are adversely affected by a state's refusal to admit them, solely because of their race, to the schools of their choice. We have now come full circle, but little or no consideration seems to have been given to the effect, of compulsory integration on Negroes and whites alike. Is there no danger in compelling children, in the name of integration, to attend a certain school in order to achieve a certain racial composition, regardless of their own desires? The matter was aptly put in *Olson v. Board of Education of Union Free School District*, 250 F. Supp. 1000, 1006 (E.D.N.Y. 1966), *appeal dismissed*, 367 F. 2d 565 (2d Cir.):

[N]or did it [*Brown*] decide that there must be coerced integration of the races in order to accomplish educational equality for this also would require an appraisal of the effect upon the hearts and minds of those who were so coerced.

Like caveats have been sounded in terms of how compulsory integration will affect the educational imperative. James Bryant Conant, whom the petitioners identify on

page 44 of their Brief as the author of the most important study of secondary education in America, warrants quoting at length:³³

In some cities, political leaders have attempted to put pressure on the school authorities to have Negro children attend essentially white schools. In my judgment the cities in which the authorities have yielded to this pressure are on the wrong track. Those which have not done so, like Chicago, are more likely to make progress in improving Negro education. It is my belief that satisfactory education can be provided in an all-Negro school through the expenditure of more money for needed staff and facilities. Moreover, I believe that any sense of inferiority among the pupils caused by the absence of white children can be largely if not wholly eliminated in two ways: first, in all cities there will be at least some schools that are in fact mixed because of the nature of the neighborhood they serve; second, throughout the city there ought to be an integrated staff of white and Negro teachers and administrators.³⁴

A similar position has been taken by Oscar Handlin, another distinguished writer, who has called integration a "false issue":³⁵

The insistence upon integration is thus self-frustrating, as the experience of Washington, D. C., shows. Further pressure toward racial balance will certainly weak-

³³Note 11, *supra*, pp. 28-29.

³⁴The second suggestion of Dr. Conant points up the wisdom of the Circuit Court in remanding this case to the District Court to review and update the record and fashion proper decrees based upon its continuing observation of the plan in operation through the retention of jurisdiction.

³⁵Note 19, *supra*, p. 282.

en the public schools and leave the Negroes the greatest sufferers.³⁶

These views warrant serious consideration. They make a point which has been overlooked too often: Desegregation (*i.e.*, the elimination of state enforced segregation solely because of race) is a legal question; integration (*i.e.*, the compulsory assignment of pupils to achieve intermingling) is an education question—best left for decision by educators, for educational purposes, on the basis of educational criteria.³⁷ A freedom of choice plan alone honors this distinction.

³⁶*Id.* at 281. The experience in Taliaferro County, Georgia (Note 26, *supra*) is a sad illustration of this. A unitary system was achieved, of course, but it is hardly what the proponents of compulsory integration intended and is unlikely to afford an adequate—let alone equal—educational opportunity to the Negro students.

³⁷See Notes 8 and 9, *supra*.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 695.—OCTOBER TERM, 1967.

Charles C. Green et al.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Fourth Circuit.
v.		
County School Board of		
New Kent County, Virginia, et al.		

[May 27, 1968.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a "freedom-of-choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a non-racial basis" *Brown v. Board of Education*, 349 U. S. 294, 300-301 (*Brown II*).

Petitioners brought this action in March 1965 seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in Eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. In a memorandum filed May 17, 1966, the District Court found that the "school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are white. The School Board operates one white combined elementary and high school [New Kent], and one Negro combined elementary and high school [George W. Watkins]. There are no attendance zones. Each

school serves the entire county." The record indicates that 21 school buses—11 serving the Watkins school and 10 serving the New Kent school—travel overlapping routes throughout the county to transport pupils to and from the two schools.

The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education, Va. Const., Art. IX, § 140 (1902); Va. Code § 22-221 (1950). These provisions were held to violate the Federal Constitution in *Davis v. County School Board of Prince Edward County*, decided with *Brown v. Board of Education*, 347 U. S. 483, 487 (*Brown I*). The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied.¹ One statute, the Pupil Placement Act, Va. Code § 22-232.1 *et seq.* (1964), not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that Act children were each year automatically reassigned to the school previously attended unless upon their application the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September 1964, no Negro pupil had applied for admission

¹ E. g., *Griffin v. County School Board of Prince Edward County*, 377 U. S. 218; *Green v. School Board of City of Roanoke*, 304 F. 2d 118 (C. A. 4th Cir. 1962); *Adkins v. School Board of City of Newport News*, 148 F. Supp. 430 (D. C. E. D. Va.), *aff'd*, 246 F. 2d 325 (C. A. 4th Cir. 1957); *James v. Almond*, 170 F. Supp. 331 (D. C. E. D. Va. 1959); *Harrison v. Day*, 200 Va. 439, 106 S. E. 2d 636 (1959).

to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

The School Board initially sought dismissal of this suit on the ground that petitioners had failed to apply to the State Board for assignment to New Kent school. However on August 2, 1965, five months after the suit was brought, respondent School Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating the schools.² Under that plan, each pupil may annually choose between the New Kent and Watkins schools and, except for the first and eighth grades, pupils not making a choice are assigned to the school previously attended; first and eighth grade

² Congress, concerned with the lack of progress in school desegregation, included provisions in the Civil Rights Act of 1964 to deal with the problem through various agencies of the Federal Government. 42 U. S. C. §§ 2000c *et seq.*, 2000d *et seq.*, 2000h-2. In Title VI Congress declared that

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d.

The Department of Health, Education, and Welfare issued regulations covering racial discrimination in federally aided school systems, as directed by 42 U. S. C. § 2000d-1, and in a statement of policies, or "guidelines," the Department's Office of Education established standards according to which school systems in the process of desegregation can remain qualified for federal funds. 45 CFR §§ 80.1-80.13, 181.1-181.76 (1967). "Freedom-of-choice" plans are among those considered acceptable, so long as in operation such a plan proves effective. 45 CFR § 181.54. The regulations provide that a school system "subject to a final order of a court of the United States for the desegregation of such school . . . system" with which the system agrees to comply is deemed to be in compliance with the statute and regulations. 45 CFR § 80.4 (c). See also 45 CFR § 181.6. See generally Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 Va. L. Rev. 42 (1967); Note, 55 Geo. L. J. 325 (1966); Comment, 77 Yale L. J. 321 (1967).

pupils must affirmatively choose a school. After the plan was filed the District Court denied petitioner's prayer for an injunction and granted respondent leave to submit an amendment to the plan with respect to employment and assignment of teachers and staff on a racially nondiscriminatory basis. The amendment was duly filed and on June 28, 1966, the District Court approved the "freedom-of-choice" plan as so amended. The Court of Appeals for the Fourth Circuit, *en banc*, 382 F. 2d 326, 338,³ affirmed the District Court's approval of the "freedom-of-choice" provisions of the plan but remanded the case to the District Court for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal, objective time table" some of the faculty provisions of the decree entered by the Court of Appeals for the Fifth Circuit in *United States v. Jefferson County Board of Education*, 372 F. 2d 836, *aff'd en banc*, 380 F. 2d 385 (1967). Judges Sobeloff and Winters concurred with the remand on the teacher issue but otherwise disagreed, expressing the view "that the District Court should be directed . . . also to set up procedures for periodically evaluating the effectiveness of the [Board's] 'freedom of choice' [plan] in the elimination of other features of a segregated school system." 382 F. 2d, at 330. We granted certiorari, 389 U. S. 1003.

The pattern of separate "white" and "Negro" schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the

³ This case was decided *per curiam* on the basis of the opinion in *Bowman v. County School Board of Charles City County*, 382 F. 2d 326, decided the same day. Certiorari has not been sought for the *Bowman* case itself.

laws. Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part “white” and part “Negro.”

It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* “to effectuate a transition to a racially nondiscriminatory school system.” 349 U. S., at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the “white” schools. See, e. g., *Cooper v. Aaron*, 358 U. S. 1. Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; it was because of the “complexities arising from the transition to a system of public education freed of racial discrimination” that we provided for “all deliberate speed” in the implementation of the principles of *Brown I*. 349 U. S., at 299–301. Thus we recognized the task would necessarily involve solution of “varied local school problems.” *Id.*, at 299. In referring to the “personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis,” we also noted that “[t]o effectuate this interest may call for elimination of a variety of obstacles in making the transition . . .” *Id.*, at 300. Yet we emphasized that the constitutional rights of

Negro children required school officials to bear the burden of establishing that additional time to carry out the ruling in an effective manner "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Ibid.* We charged the district courts in their review of particular situations to

"consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." *Id.*, at 300-301.

It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order

to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper v. Aaron, supra*, at 7; *Bradley v. School Board*, 382 U. S. 103; cf. *Watson v. City of Memphis*, 373 U. S. 523. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.⁴

In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reason-

⁴ "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discriminations in the future." *Louisiana v. United States*, 380 U. S. 145, 154. Compare the remedies discussed in, e. g., *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241; *United States v. Crescent Amusement Co.*, 323 U. S. 173; *United States v. Standard Oil Co.*, 221 U. S. 1. See also *Griffin v. County School Board*, 377 U. S. 218, 232-234.

able start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson v. City of Memphis*, *supra*, at 529; see *Bradley v. School Board*, *supra*; *Rogers v. Paul*, 382 U. S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin v. County School Board*, 377 U. S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss v. Board of Education*, 373 U. S. 683, 689. See *Calhoun v. Latimer*, 377 U. S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of

course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. See No. 805, *Raney v. Board of Education*, post, at p. 5.

We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. As Judge Sobeloff has put it,

"'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, non-racial system.'" *Bowman v. County School Board*, 382 F. 2d 326, 333 (C. A. 4th Cir. 1967) (concurring opinion). Accord, *Kemp v. Beasley*, 389 F. 2d 178 (C. A. 8th Cir. 1968); *United States v. Jefferson County Board of Education*, supra.

Although the general experience under "freedom of choice" to date has been such as to indicate its ineffectiveness as a tool of desegregation,⁵ there may well be in-

⁵The views of the United States Commission on Civil Rights, which we neither adopt nor refuse to adopt, are as follows:

"Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and border States, require

stances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a

affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:

"(a) Fear of retaliation and hostility from the white community continue to deter many Negro families from choosing formerly all-white schools;

"(b) During the past school year [1966-1967], as in the previous year, in some areas of the South, Negro families with children attending previously all-white schools under free choice plans were targets of violence, threats of violence and economic reprisals by white persons and Negro children were subjected to harassment by white classmates notwithstanding conscientious efforts by many teachers and principals to prevent such misconduct;

"(c) During the past school year, in some areas of the South public officials improperly influenced Negro families to keep their children in Negro schools and excluded Negro children attending formerly all-white schools from official functions;

"(d) Poverty deters many Negro families in the South from choosing formerly all-white schools. Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;

"(e) Improvements in facilities and equipment . . . have been instituted in all-Negro schools in some school districts in a manner that tends to discourage Negroes from selecting white schools."

Southern School Desegregation, 1966-1967, at 88 (1967). See *id.*, at 45-69; Survey of School Desegregation in the Southern and Border States 1965-1966, at 30-44, 51-52 (U. S. Comm'n on Civil Rights 1966).

unitary, nonracial school system, "freedom of choice" must be held unacceptable.

The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning,⁶ fashion steps

⁶ "In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a 'unitary, non-racial system' could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient." *Bowman v. County School Board, supra*, n. 3, at 332 (concurring opinion).

Petitioners have also suggested that the Board could consolidate the two schools, one site (e. g., Watkins) serving grades 1-7 and the other (e. g., New Kent) serving grades 8-12, this being the grade division respondent makes between elementary and secondary levels. Petitioners contend this would result in a more efficient

which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

The judgment of the Court of Appeals is vacated insofar as it affirmed the District Court and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

system by eliminating costly duplication in this relatively small district, while at the same time achieving immediate dismantling of the dual system.

These are two suggestions the District Court should take into account upon remand, along with any other proposed alternatives and in light of considerations respecting other aspects of the school system such as the matter of faculty and staff desegregation remanded to the court by the Court of Appeals.

